



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 30 2003

OFFICE OF
CIVIL RIGHTS

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RETURN RECEIPT REQUESTED

In Reply Refer to:
EPA No. 9R-00-R9

Stephen A. Owens
Director
Arizona Department of Environmental Quality
1110 West Washington Street
Phoenix, Arizona 85007-2935

CERTIFIED MAIL # 7001 2510 0002 9127 5495
RETURN RECEIPT REQUESTED

Luke Cole
Center for Race, Poverty and the Environment
631 Howard Street, Suite 330
San Francisco, California 84105-3907

Re: Letter of Concern -- EPA File No. 9R-00-R9 (IWU Negotiating Team, South Phoenix, AZ)

Dear Mr. Owens, and Mr. Cole:

On August 7, 2000, a complaint was filed with EPA's Office of Civil Rights by the Center on Race, Poverty and the Environment on behalf of the IWU Negotiating Team, a community group of South Phoenix residents, regarding a hazardous waste storage and treatment facility permit for Innovative Waste Utilization LLC. The complaint alleged violations of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d *et seq.*, and EPA's regulations implementing Title VI at 40 C.F.R. Part 7 by the Arizona Department of Environmental Quality. The Center submitted supplemental comments to the Complaint on August 23, 2000. According to the complainants, ADEQ discriminated against African-American and Hispanic residents of the Central Phoenix Corridor during the permitting process for IWU.

This letter and the accompanying Final Investigation Report constitute OCR's finding under Title VI and 40 C.F.R. Part 7, and its dismissal of this Title VI complaint. OCR's findings, and the legal and factual bases for those findings, are set forth in detail in the Investigation Report, which is incorporated herein by reference. Although OCR is dismissing this complaint,

the investigation raised a number of significant concerns related to ADEQ's activities in issuing the IWU permit. Consequently, this letter offers several suggestions related to those concerns.

Legal Background for Complaint.

Title VI prohibits discrimination on the basis of race, color, or national origin under programs or activities of applicants and recipients of federal financial assistance. EPA has adopted regulations to implement Title VI. 40 C.F.R. Part 7. EPA's regulations prohibit intentional discrimination and discriminatory effects that occur in the administration of an EPA recipient's programs or activities. ADEQ is a recipient of EPA financial assistance and is therefore subject to the requirements of Title VI and EPA's implementing regulations.

The Title VI Complaint.

The complaint alleged that ADEQ discriminated against Hispanic and African-American residents of the affected area by denying them the opportunity to adequately participate in the public hearing and public meeting regarding IWU's draft permit (*e.g.*, failure to provide for Spanish translators during an informal question and answer session, failure to adequately distribute flyers announcing the public meeting, holding the public hearing in an area with inadequate public transportation, and failure to inform Spanish-only speakers at the beginning of the public meeting that translation would be provided).

The complaint also alleged that ADEQ discriminated against Hispanic and African-American residents of the affected area through misrepresentations regarding the outcome of the permitting process (*i.e.*, ADEQ staff allegedly stated that regardless of any testimony presented by the public, IWU would receive its permit because it had complied with and submitted all the paperwork requirements).

The Title VI Investigation.

EPA's investigation included full review of the complaint, the recipient's response, and of State records of facility operations; interviews with complainants and recipients; an evaluation of applicable ADEQ enforcement guidance and policies; review of relevant transcripts; and review of the facility's current status. EPA construed and investigated the accepted claims as allegations of intentional discrimination. The investigation revealed that insufficient evidence was available to analyze these allegations under a disparate impact standard.

Findings.

The Complaint raised allegations with respect to both a public hearing held in November 1999 and a public meeting held in February 2000. EPA's investigation revealed that the allegations regarding events on or before November 3, 1999, were untimely because they occurred more than 180 days before the complaint was filed. 40 C.F.R. § 7.120(b)(2). EPA has

reviewed the untimely allegations solely as background for the viable, timely allegations of intentional discrimination. However, EPA is required to, and does hereby, reject as untimely all allegations relating to the November 3, 1999, public hearing.

EPA's investigation revealed that ADEQ took some steps to inform Spanish speakers about the IWU public hearing and public meeting process and to assist these individuals at these events. However, ADEQ's efforts were poorly coordinated, in large measure because the agency lacks a uniform policy and procedures on translation and interpretation. Nonetheless, ADEQ's somewhat unsatisfactory and ineffective efforts to accommodate the needs of Spanish-only speakers of South Phoenix, taken as a whole, do not provide a basis for a finding of intentional discrimination under Title VI. This conclusion is based on the following findings:

- ADEQ took numerous steps to provide notice of the hearing and meeting. While those efforts did not succeed in notifying everyone about the hearing and meeting, they provide strong circumstantial evidence that ADEQ did not intend to discriminate.
- ADEQ's lack of attention to transportation considerations disadvantaged South Phoenix residents in their ability to attend the November 1999 public hearing, which was not held at a readily accessible location. In recognition of this problem, ADEQ subsequently held a series of public meetings, including the February 2000 meeting, in the affected community, within walking distance of the residents. ADEQ also extended the public comment period for the IWU permit until after the last public meeting.
- ADEQ changed the format of the November 3, 1999, public hearing to accommodate the needs of the community. The event was conducted as both a public hearing and a public meeting, in a manner that the community found confusing. Whatever deficiencies may have occurred during the public hearing were corrected by the subsequent series of public meetings, including the February 2000 meeting, thereby ameliorating any disadvantage to the community occasioned by the unconventional format of the hearing. ADEQ's corrective actions provided the complainants the opportunity to fully participate in the IWU permitting process.
- EPA's investigation did not substantiate the complaint's claim that ADEQ misrepresented itself during the permit process. Rather, the facts gathered during the investigation showed that ADEQ seriously considered the comments and suggestions provided by the community and made adjustments to the IWU permit in response to concerns raised by the community.

Conclusion and Recommendations.

Upon review of the materials submitted and information gathered during its investigation, as well as controlling legal authority, and in consideration of recommended actions noted above, EPA has not found a violation of Title VI or EPA's implementing regulations in this complaint. Accordingly, EPA is dismissing the complaint as of the date of this letter.

However, EPA's investigation did identify a number of concerns relating to ADEQ's activities in issuing the IWU permit. There are several opportunities for ADEQ to address these concerns and to improve its service to its communities. While these suggestions do not cover all options available to ADEQ, they serve as a starting point for accommodations that ADEQ can provide to its constituency and may lessen ADEQ's potential for future violations of Title VI and EPA regulations implementing Title VI.

1. In order to more fully accommodate the needs of speakers of languages other than English, ADEQ should consider adopting a written policy and procedure on translation and interpretation, and training its staff accordingly. When establishing the policy and procedure, ADEQ should refer to the U.S. Department of Justice's *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (DOJ LEP Guidance).¹ The DOJ LEP Guidance suggests a four-factor analysis for recipients to determine the extent of their obligation to provide LEP services.
2. EPA will, in the next few months, release its *Proposed Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*. EPA urges ADEQ to avail itself of this document once it is released, as it will provide ADEQ with suggestions for EPA recipient agencies to assist non-English speakers.
3. Arizona State University has a well-developed interpreter program that ADEQ may wish to consult. The website for that program is www.asu.edu/educ/epsl/lpru.htm.
4. ADEQ could provide training to staff in assisting speakers of other languages when these individuals call the agency (e.g., ensure that ADEQ staff know to whom to refer speakers of other languages within the agency to have their questions answered) as well as provide sensitivity training to staff members.
5. ADEQ could engage trained interpreters for public hearings, when appropriate, and/or, train ADEQ bilingual staff in interpretation services and legal terminology

¹ 67 Fed. Reg. 41,455 (2002)

in the foreign languages to be used during hearings.

6. ADEQ could ensure that speakers of languages other than English learn about the availability of interpretation services at public hearings through:
 - a. Postings announcing the availability of translators at the entrance of the public hearing.
 - b. Stating in the public notices that interpretation services will be provided.
 - c. Working with community groups to ensure that non-English speakers are made aware of hearings or meetings and that interpretation will be provided.
 - d. Making announcements in English and other predominant language(s) in the affected community.
 - e. Including linguistically accessible telephone numbers in written materials (e.g., a flyer in Spanish should provide the caller with a phone number to contact a Spanish-speaking person) and providing an option of interpretation services at the hearing through advance notice to ADEQ.
 - f. Placing public service announcements on local radio shows; using audio or video tapes in the language used by members of the affected community.
7. To ensure that affected populations are adequately informed about upcoming hearings and meetings, ADEQ should consider the outreach suggestions in the *Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (Recipient Guidance).² In addition, based on the specific issues discussed in this report, ADEQ should consider using the following as possible mechanisms to reach affected communities in permitting situations:
 - a. Mail public notices to both owners and renters of property within a 3-mile radius of the proposed facility.
 - b. Insert notices with utility bills; place notices on bulletin boards in grocery stores, houses of worship, community newspapers and community centers.
 - c. Consider regularly posting notices of public hearings in areas where members of the affected communities are likely to read them.
 - d. Consider public transportation availability when selecting the location for public hearings.
8. Create a checklist with all of the items outlined above, and those that ADEQ considers important for the efficient execution of public hearings or meetings, and ensure that the checklist is used every time a public hearing is held.

² 65 Fed. Reg. 39,655 (2000).


EPA recognizes ADEQ's most recent efforts to assist both the South Phoenix community and communities that live with the presence of permitted facilities. The "South Phoenix Environment Initiative" seems to be improving the conditions of South Phoenix, and EPA expects that ADEQ will continue this work. EPA also commends ADEQ for its recent implementation of a Spanish language telephone line to enable the State's Spanish-speakers to access the same information as their English-speaking neighbors.

Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against any individual or group because of action taken or participation in any action to secure rights protected under Title VI. 40 C.F.R. § 7.100.

Under the Freedom of Information Act, 5 U.S.C. § 552, EPA may be required to release this document, the Final Investigation Report, and related correspondence, documents, and records, upon request. In the event of such a request, EPA will seek to protect, to the extent provided by law, any personal information, which, if released, could constitute an unwarranted invasion of the privacy of any individual.

In closing, I would like to thank both the representatives of the IWU Negotiating Team and ADEQ's staff for their assistance during this investigation. If you have any questions or would like to discuss these recommendations further, please feel free to contact Eva Hahn by phone at (202) 564-8186, or by mail to the U.S. EPA, Office of Enforcement and Compliance Assurance (Mail Code 2201A), Title VI Task Force, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

Sincerely,



Karen D. Higginbotham
Director

Enclosure

cc: Stephen G. Pressman, Associate General Counsel (Acting)
Office of General Counsel (MC 2399A)

Phyllis P. Harris, Principal Deputy Assistant Administrator
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**U.S. Environmental Protection Agency
Office of Civil Rights**

INVESTIGATIVE REPORT

for

**Title VI Administrative Complaint File No. 9R-00-R9
(IWU Negotiating Team Complaint)**

I. INTRODUCTION

Title VI of the Civil Rights Act of 1964, as amended (Title VI), prohibits discrimination based on race, color, or national origin under any program or activity of a recipient of federal financial assistance.¹ Title VI prohibits intentional discrimination and authorizes federal agencies to adopt implementing regulations that also prohibit discriminatory effects.² The United States Environmental Protection Agency's Title VI implementing regulations are codified at 40 C.F.R. Part 7. Under these regulations, the actions of a recipient of EPA financial assistance may not intentionally discriminate or have a discriminatory effect based on race, color, or national origin.

As provided at 40 C.F.R. § 7.120, administrative complaints alleging discriminatory acts in violation of 40 C.F.R. Part 7 may be filed with the Agency. EPA reviews accepted complaints in accordance with 40 C.F.R. Part 7, Subpart E (§§ 7.105-7.135).

On August 7, 2000, the IWU Negotiating Team, a community group in South Phoenix, Arizona, filed a complaint, pursuant to EPA's Title VI regulations, which alleged that the Arizona Department of Environmental Quality (ADEQ) discriminated against Hispanics and African-Americans: (1) by denying them the opportunity to adequately participate in the public hearing regarding Innovative Waste Utilization LLC's (IWU) draft permit; and (2) through misrepresentations regarding the outcome of the permitting process. This Investigative Report describes EPA's investigation of this matter and recommends that EPA make no findings of violation against ADEQ and that the IWU Negotiating Team's Title VI complaint be dismissed pursuant to 40 C.F.R. § 7.120(g). This report also suggests that recommendations be made to ADEQ for addressing certain issues uncovered during the investigation which do not rise to the level of Title VI violation, but which are of sufficient concern to warrant further attention.

A. Statutory Background

Under Section 601 of Title VI,

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.³

¹ 42 U.S.C. §§ 2000d to 2000d-7.

² See *Alexander v. Choate*, 469 U.S. 287, 292-294 (1985); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589-93 (1983).

³ 42 U.S.C. § 2000d.

This section prohibits intentional discrimination.⁴ In addition, Section 602 “authorize[s] and direct[s]” federal departments and agencies that extend federal financial assistance “to effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability.”⁵ At least forty federal agencies have adopted regulations that prohibit disparate impact discrimination pursuant to this authority.⁶ The Supreme Court has held that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.⁷

B. Regulatory Background - Intentional Discrimination/Disparate Treatment

EPA’s Title VI implementing regulations prohibit intentional discrimination:

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin⁸

In addition, EPA regulations specifically provide, in part, that recipients shall not “[d]eny a person any service, aid or other benefit of the program,”⁹ “[p]rovide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program,”¹⁰ or “[r]estrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program.”¹¹

Where direct proof of discriminatory motive is unavailable, claims of intentional discrimination under Title VI may be analyzed using the Title VII burden-shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.¹² The

⁴ See *Alexander*, 469 U.S. at 293; *Guardians*, 463 U.S. at 607-08.

⁵ 42 U.S.C. § 2000d-1.

⁶ See *Guardians*, 463 U.S. at 619 (Marshall, J. dissenting).

⁷ See *Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 582; see also *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, *reh’g denied*, 7 F.3d 242 (11th Cir. 1993).

⁸ 40 C.F.R. § 7.30.

⁹ 40 C.F.R. § 7.35(a)(1).

¹⁰ 40 C.F.R. § 7.35(a)(2).

¹¹ 40 C.F.R. § 7.35(a)(3).

¹² 411 U.S. 792 (1973); see also *Baldwin v. Univ. of Texas Med. Branch at Galveston*, 945 F. Supp. 1022, 1031 (S.D.Tex. 1996); *Brantley v. Independent Sch. Dist. No. 625, St. Paul Public Schools*, 936 F. Supp. 649, 658 n.17 (D.Minn. 1996).

elements of a *prima facie* case may vary depending on the facts of the complaint, but such elements often include the following:

1. that the aggrieved person or group belonged to a protected class;
 2. That this person applied for, and was eligible for, a benefit provided by a federally assisted program;
 3. that despite the group's or person's eligibility for the benefit, the group or person was denied or failed to receive the benefit; and,
 4. that the recipient provided the benefit to other similarly situated individuals, or otherwise denied the person or group the benefit because of race, color, or national origin.
- McDonnell Douglas*; *Cf. Bass v. Board of Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1104 (11th Cir. 2001) (describing elements of *prima facie* case under Title VII).

If an evaluation of the evidence suggests that the challenged actions were “motivated in part by a racially discriminatory purpose,” the burden shifts to the recipient to provide a justification or “establish[] that the same decision would have resulted even had the impermissible purpose not been considered.”¹³ If the recipient can make such a showing, the inquiry shifts back to EPA to show whether the justification proffered by the recipient is actually a pretext for discrimination.¹⁴

While the *McDonnell Douglas* analysis concerns the burden of producing evidence, for purposes of this administrative investigation, the ultimate burden of proof remains with EPA. *Cf. St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (notwithstanding *McDonnell Douglas*'s burden shifting analysis, the burden of proof remains with the plaintiff). Consequently, even if the *McDonnell Douglas* analysis indicates a violation, it may be necessary to evaluate whether any circumstantial evidence of discriminatory intent exists in order ensure that the burden of proof has been satisfied. Such evidence may be found in various sources including statements by decision-makers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedures, the minutes of meetings, a past history of discriminatory conduct, and evidence of a substantial disparate impact on a protected group.¹⁵

C. Factual Background

On August 7, 2000, a complaint was filed with EPA's Office of Civil Rights by the

¹³ *Id.* at 271, n.21; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

¹⁴ *Id.* See generally, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁵ See *Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment).

Center on Race, Poverty and the Environment on behalf of the IWU Negotiating Team, a community group of South Phoenix residents, regarding a hazardous waste storage and treatment facility permit for Innovative Waste Utilization LLC. The complaint alleged violations of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d *et seq.*, and EPA's regulations implementing Title VI at 40 C.F.R. Part 7 by the Arizona Department of Environmental Quality. The Center submitted supplemental comments to the Complaint on August 23, 2000. According to the complainants, ADEQ discriminated against African-American and Hispanic residents of the Central Phoenix Corridor during the permitting process for Innovative Waste Utilization LLC.¹⁶

EPA accepted the complaint for investigation in a letter dated December 11, 2001.¹⁷ The complaint met the four jurisdictional criteria found in Part 7: the complaint was submitted in writing; the complaint alleged that ADEQ's actions during the permit hearing process for IWU's hazardous waste storage and treatment facility violated Title VI and Part 7; the alleged discriminatory act occurred during the week of February 9-15, 2000, which was within 180 days of August 7, 2000, when the complaint was filed; and ADEQ was a recipient of EPA financial assistance at the time of the alleged discriminatory act. 40 C.F.R. §§ 7.15, 7.120(b). In addition, the complaint was filed by an authorized representative of the individuals who were allegedly discriminated against. 40 C.F.R. § 7.120(a).

The allegations in the complaint also encompass events that occurred on or before November 3, 1999. These events fall outside the jurisdictional requirement found at 40 C.F.R. § 7.120(b), which states that in order for EPA to accept and investigate an allegation, the complaint must be filed within 180 days of occurrence of the alleged discriminatory act. Although EPA will reject the allegations regarding the November 3, 1999, events, EPA reviewed these allegations as background to properly analyze the events that took place during the week of February 9-15, 2000.

¹⁶ On February 25, 2003, Investigators from Arizona and the federal government executed a warrant at the IWU facility at issue in this complaint after authorities said they uncovered evidence showing that the firm was allegedly handling and treating its waste in an illegal manner. On February 26, 2003, ADEQ suspended and revoked the Hazardous Waste Permit issued to IWU for the treatment, and storage of hazardous waste. *See The Arizona Republic, Agents raid Phoenix company in meth crackdown*, February 25, 2003. *See also* In the Matter of Innovative Waste Utilization, L.L.C., Revocation of Hazardous Waste Facility Permit, Docket No. Z-22-03; Suspension of Hazardous Waste Facility Permit, Docket No. Z-23-03; and Compliance Order, Docket No. Z-24-03.

¹⁷ While U.S. EPA acknowledges that the incident described in footnote 16, above, renders the IWU facility out of operation, it has decided to go forward in issuing this investigation report and accompanying Letter of Concern. During the course of its investigation of the IWU complaint, EPA identified some issues of concern in ADEQ's actions regarding the issuance of the IWU permit that could present future Title VI problems. These issues, which focus on alleged discrimination during the public participation process for the IWU permit and not on substantive violations of the permit, are unrelated to the now suspended operations of the IWU facility. EPA's recommendations on ADEQ's public participation process should benefit ADEQ in the long-run.

II. ALLEGATIONS

The complaint contained two specific allegations:

ADEQ discriminated against Hispanic and African-American residents of the affected area by denying them the opportunity to adequately participate in the public hearing regarding IWU's draft permit (*i.e.*, failure to provide for Spanish translators during an informal question and answer session, failure to adequately distribute flyers announcing the public meeting, holding the public hearing in an area with inadequate public transportation, and failure to inform Spanish-only speakers at the beginning of the public meeting that translation would be provided).

ADEQ discriminated against Hispanic and African-American residents of the affected area through misrepresentations regarding the outcome of the permitting process (*i.e.*, ADEQ staff stated that regardless of any testimony presented by the public, IWU would receive its permit because it had complied with and submitted all the paperwork requirements).

Both of these allegations claim intentional discrimination because they state that the complainants were treated differently than other, similarly situated, persons, because of their race or national origin.²³ Although the first claim can also be construed as alleging a disparate impact, EPA's investigation was unable to gather sufficient evidence to fully analyze a disparate impact claim. In particular, EPA made specific request to the complainants to (1) identify individuals who allegedly left the November 1999 hearing or February 2000 meeting because they could not understand the English presentation, but the complainants failed to identify any such individuals; (2) made specific requests to the complainants to identify individuals who stayed throughout the duration of the November 1999 hearing or February 2000 meeting but did not fully understand what was happening during the hearing because of their limited English abilities, but the complainants failed to identify any such individuals; (3) made specific requests to the complainants to identify individuals who allegedly did not attend the November 1999 hearing because the location was too far away and they did not have a means of transportation, but the complainants failed to identify any such individuals; (4) sought to obtain from complainants a copy of a video of the November 1999 hearing which complainants informed EPA they had in their possession and which, according to the complainants, captured individuals leaving the

²³ The Agency recognizes that language-based actions, such as failure to provide translation services, may serve as a proxy for intentional race- or national origin based discrimination. See U.S. Department of Justice, *Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance*, 65 Fed. Reg. 50,123, 50,124 n. 8 (2000) (citing *Hernandez v. New York*, 500 U.S. 352, 370 (1991) (plurality opinion)). Therefore, in conducting the intentional discrimination analysis in this Investigative Report, the Agency assumes, as a threshold matter, that ADEQ's alleged failure to provide Spanish language translation services might have been a proxy for intentional discrimination against Hispanics or African Americans.

meeting early and showed other deficiencies in the manner in which the hearing was conducted, but the complainants failed to deliver the video. It is also worth noting that complainants offered the names of individuals who, while not affected by the IWU permitting process attended either the November 1999 hearing and the February 2000 meeting. EPA did not interview these individuals given that EPA was able to interview members of the community who attended the hearing and meeting and also had copies of the transcripts of both proceedings.

The evidence gathered during the course of the investigation is inadequate to establish whether ADEQ's action disparately impacted Hispanics or African Americans. EPA attempted to ascertain the proportion of Spanish-only speakers at the meeting and to determine whether any individuals left the hearing or meeting due to apparent lack of interpreters. However, EPA was unable to establish either fact. Therefore, we will not analyze this claim under a disparate impact analysis.

A. ALLEGATIONS A.1-A.4: ADEQ Failed to Provide Adequate Public Participation to Hispanic and African-American Residents of the Affected Area

1. ALLEGATION A.1: ADEQ's Alleged Failure to Allow Spanish-Only Speakers of the South Phoenix Community to Adequately Participate in the Issuance of the IWU Permit

Complainants allege that members of their protected group who speak only Spanish were not provided the necessary translation services to enable them to participate in public events regarding the IWU permit.

In one example, two weeks prior to the November 3, 1999, public hearing for the IWU permit, two members of the South Phoenix community called ADEQ to ensure that Spanish translation would be made available during the hearing.²⁴ Dennis Clayton, former Hazardous Waste Permit Supervisor at ADEQ, allegedly told them that "the ADEQ is not planning on providing one [a translator] and that to become a U.S. citizen your [sic] must speak English."²⁵

²⁴ Interview with Terry Johnson, representative for Children for a Safe Environment and complainant, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 11, 2002). Ms. Johnson is one of the two people who spoke with Dennis Clayton requesting a translator for the hearing. *See also* Tape-recorded transcript of Public Hearing for Proposed Draft Hazardous Waste Permit for Innovative Waste Utilization, at 32 (November 3, 1999) (Hearing Tape-recording transcript).

²⁵ Letter from Children for a Safe Environment, to Jacqueline Schaffer, Acting Director ADEQ (October 20, 1999). Appendix E to the Supplemental Comments submitted by Luke Cole, on behalf of the IWU Negotiating Team, on August 23, 2000 (Supplemental Comments).

According to the complainants, ADEQ did not provide translators during the hearing.²⁶ They explained that, at the beginning of the public hearing, an announcement was made, in English only, that Spanish translation would be provided, if needed, by Edna Gonzalez and Tibaldo Canez, ADEQ employees.²⁷ However, Ms. Gonzalez allegedly sat at the back of the room, where she could not be reached, near the Hearing Officer, and Mr. Canez allegedly attended to other matters and therefore was unable to provide any translations.²⁸

In the complaint it is alleged and several witnesses stated during their interviews, that a few Spanish-only speakers left the hearing because they did not know how to get translation assistance,²⁹ and that neither of the Spanish speaking ADEQ staff at the meeting were versed in RCRA matters.³⁰ The complainants also told EPA that ADEQ did not provide any explanation or summary related to the permit in Spanish.³¹

According to the complainants, no Spanish translators were available to assist the Spanish-only speakers during the February 9, 2000, public meeting.³² Once again, complainants stated that several Spanish-only speakers left the meeting because no translation services were

²⁶ Interviews with [REDACTED], complainant, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 11, 2002) and [REDACTED], complainant, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 9, 2002).

²⁷ Interviews with Terry Johnson and [REDACTED], complainants, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 9, 2002). This scenario was also confirmed in telephone interviews with ADEQ staff Martha Seaman, public hearing officer at the IWU hearing, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (October 8, 2002), Edna Gonzalez, ADEQ Border Programs Staff (July 30, 2002), and Tibaldo Canez, Coordinator for ADEQ Border Environmental Projects 1995-2000 (October 23, 2002).

²⁸ Interview with Ms. Johnson, complainant. *See also* Hearing Tape-recording, at 32, where Penny Brophy, a public hearing attendee, is recorded as saying: "When Father prayed that prayer tonight, and he said it in Spanish, I kind of realized I did not know one word that he said, and I know how people back here that don't understand English must feel about what we're saying about these technical issues."

²⁹ Interviews with [REDACTED] and Ms. Johnson, complainants. EPA requested during interviews with the complainants to be put in touch with one, or more, of the Spanish-only speakers who allegedly left the public hearing when no translation was provided. That request was never met. *See also* Supplemental Comments at 5 and Title VI Complaint, EPA No. 9R-00-R9 (Complaint), submitted by Luke Cole, on behalf of the IWU Negotiating Team, on August 7, 2000, at 5.

³⁰ Interview with Ms. Johnson, complainant.

³¹ Interview with [REDACTED] and [REDACTED], complainants. *See also* Hearing Tape-recording, at 70

³² The Complaint alleges that an announcement that translation services were available was made in English only, but no such services were, in fact, provided. EPA's investigation revealed that no announcement, in either English or Spanish, was made at the February 9, 2000, public meeting, and that translation services were available that evening. Complaint at 5.

available to them that evening.³³ Complainants also allege a lack of documentation relating to the permit, in both English and Spanish, at this meeting.³⁴

2. ALLEGATION A.2: Alleged Failure to Adequately Inform the Public of the February 2000 Meeting

Complainants alleged that there was inadequate notice of the IWU November 3, 1999, public hearing.³⁵ Most of the South Phoenix residents found out about the hearing through the Phoenix Revitalization Corporation (PRC), a South Phoenix non-profit outreach organization.³⁶ PRC found out about the hearing through South Phoenix residents [REDACTED] and [REDACTED].³⁷ At least one of the complainants, [REDACTED], told EPA that she does not read the newspaper and, were it not for PRC, she would not have found out about the hearing.³⁸

The complaint also states that ADEQ failed to give notice of the February 9, 2000, public meeting held at the Mary Bethune Elementary School to those living next to the site.³⁹ According to the complaint, ADEQ printed flyers, in English and Spanish, announcing the meeting but instead of distributing them around the neighborhood, only dropped them off at the Bethune Elementary school expecting the teachers to send them home with the children.⁴⁰ In addition, Terry Johnson told EPA that she and a friend took it upon themselves to print flyers in English and Spanish announcing the meeting and delivered them throughout the South Phoenix

³³ *Id.* Despite EPA requests, EPA was never put in touch with Spanish-only speakers who allegedly left the public meeting early.

³⁴ Interview and conversations with Julian Sodari, complainant and outreach coordinator for PRC, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 9-11, 2002).

³⁵ Complaint at 5.

³⁶ Interviews with [REDACTED], Ms. Johnson and [REDACTED], complainants.

³⁷ Conversation with [REDACTED], South Phoenix resident, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 9, 2002) and interviews with [REDACTED], [REDACTED] and Mr. Sodari, complainants. [REDACTED] read the public notice of the hearing in the Business Gazette, a relatively expensive newspaper whose primary readership is business owners. After reading the notice, [REDACTED] informed [REDACTED] at PRC about the upcoming public hearing. A week and a half before the public hearing [REDACTED] read an article about the IWU permit in the Arizona Republic in which the public hearing was also mentioned. [REDACTED] informed Mr. Sodari of the PRC about the hearing.

³⁸ Interview with [REDACTED], complainant.

³⁹ Complaint at 5.

⁴⁰ *Id.*

area, door-to-door.⁴¹ Ms. Johnson told EPA that she undertook this task because ADEQ's method for advertising the meeting was not adequate.

3. ALLEGATION A.3: Alleged Failure to Hold the November 3, 1999, Public Hearing at a Location Easily Accessible by the Affected Community

The November 3, 1999, public hearing for the IWU permit was held at the South Mountain High School. The complaint states that the High School is four miles away from the IWU facility.⁴² According to the South Phoenix residents interviewed by EPA, public transportation to South Mountain High School, from their neighborhood, is inconvenient and did not run very late at night.⁴³ Witnesses stated that some of the attendees had to leave the hearing early in order to catch the last bus back to their neighborhood.⁴⁴ Other South Phoenix residents did not attend the meeting because they considered the location to be too far from their homes and the transportation to get there was too inconvenient.⁴⁵

None of the South Phoenix residents whom EPA interviewed believed that the South Mountain High School was inadequate as a facility. Rather, their grievance concerned the location of the facility, the distance from their homes to the high school, and the lack of adequate transportation available to them to attend the hearing. They also argued that their neighborhood has adequate facilities, including two elementary schools and two public gyms, in which the public hearing could have been held.⁴⁶ Thus, they believed there was no reason to hold the hearing at such a distance from the community unless ADEQ's intent was to minimize the number of South Phoenix residents that could attend the hearing.⁴⁷

⁴¹ Interview with Ms. Johnson, complainant. Ms. Johnson undertook this activity along with [REDACTED].

⁴² Complaint at 5.

⁴³ Interviews with [REDACTED], Mr. Sodari, [REDACTED] and [REDACTED], complainants. *See also* Hearing Tape-recording, at 40.

⁴⁴ Interviews with Mr. Sodari, [REDACTED] and [REDACTED], complainants.

⁴⁵ Hearing Tape-recording transcript at 32. Penny Brophy stated at the hearing: "I'd like to know why is this public hearing being held so far away from the affected area. There's a school right in the neighborhood. Last night we marched through that neighborhood and people said, 'I can't go tomorrow night because I don't have a car and the buses won't be running by the time it's time to go home.'"

⁴⁶ Complaint at 5 and interview with Mr. Sodari, complainant. *See also* Hearing Tape-recording, at 36.

⁴⁷ Interview with Mr. Sodari, complainant. It is also worth noting that many South Phoenix residents work in the construction business and their shifts begin at 4:00 or 5:00 a.m. *Id.* The amount of time it took to get back from the hearing coupled with the fact that the meeting ran so late forced these individuals to leave the hearing early. Had

4. **ALLEGATION A.4: Alleged Failure to Follow Proper Format at the February 2000 Meeting**

The complaint alleges that, instead of holding a public hearing on November 3, 1999, as it had advertised, ADEQ conducted an informal question and answer session.⁴⁸ The complaint further states that ADEQ personnel were not prepared to answer any questions posed by the community during that evening and that there was limited opportunity for anyone in the community to comment on the draft permit.⁴⁹ During her interview, Terry Johnson explained to EPA that earlier in the day of the hearing, John Godec, the hearing facilitator, called her to discuss the possibility of holding a public meeting (*i.e.*, question and answer session) instead of the public hearing. Ms. Johnson told Mr. Godec that the proposed strategy was improper because a public hearing had been advertised and the community deserved its day to comment on the permit.⁵⁰

Another interviewee, [REDACTED], told EPA that the hearing did not address any of the needs of the community. Allegedly, ADEQ staff did not: 1) go through a narrative discussion of the permit application; 2) explain what sort of activities IWU was involved in at the time and what changes would result from the issuance of the permit; or 3) explain the details of the permit or its consequences for the community. The complainants allege that ADEQ personnel spent most of their time during the meeting introducing themselves and what their role was at ADEQ, instead of addressing the issues related to the permit, and that they left very little time for questions and answers.⁵¹ According to [REDACTED], no agenda was followed during the hearing so the public had no idea of what was going on, both with regard to the permit and how to participate in the hearing and submit comments.

The complaint also states that the format of the February 9, 2000, public meeting was not that of a public hearing but that of an informal meeting at which IWU representatives were on the

the hearing been held in a location closer to where the affected individuals live or if direct transportation had been provided, individuals working in construction may have been able to stay through the whole hearing. *Id.*

⁴⁸ Complaint at 5. For the sake of readability, this report will refer to the November 3, 1999, gathering as a "hearing."

⁴⁹ Complaint at 5, interviews with [REDACTED] and [REDACTED], complainants. *See also* Hearing Tape-recording, at 87.

⁵⁰ *Id.* Mr. Godec contacted Ms. Johnson because they had dealt with each other previously in other matters. Mr. Godec was formerly an ADEQ employee and in that capacity he came to learn that Ms. Johnson was an advocate of the South Phoenix community.

⁵¹ Interviews with [REDACTED], Mr. Sodari, and [REDACTED], complainants.

agenda and were allowed to speak for a long time.⁵² During his interview, Julian Sodari stated that at the meeting, ADEQ explained in detail the permitting process. However, he alleged that ADEQ's answers to the public's questions were inadequate during the meeting.

B. ALLEGATION B: ADEQ Made Misrepresentations Regarding the Outcome of the Permitting Process

The South Phoenix residents stated that when they left the South Mountain High School at the end of the Public Hearing on November 3, 1999, they left with a sense that the hearing had been pro forma, conducted only with the intent of satisfying the requirements of the regulations but not to take into account the needs of the community.⁵³ Thus, complainants were led to believe that the permit would be issued no matter what the community had to say about the permit.⁵⁴ According to the complaint, ADEQ staff stated during the permitting process that regardless of any testimony presented by the public, IWU would receive its permit because it had complied with and submitted all the paperwork requirements.⁵⁵ In addition, some of the residents of South Phoenix felt that they were being misled by ADEQ with respect to the danger posed by IWU in their neighborhood.⁵⁶

III. RECIPIENT'S RESPONSE TO THE ALLEGATIONS

A. General Arguments Urging Dismissal of the Complaint

In its June 13, 2002, response to EPA regarding the complaint allegations, ADEQ made the following general arguments for dismissing the complaint:

1. The Center for Race, Poverty and the Environment is not affected by the IWU permit and the complaint provides no basis for concluding that it represents the South Phoenix Community.⁵⁷

⁵² Complaint at 5.

⁵³ Interviews with [REDACTED], Mr. Sodari and [REDACTED], complainants.

⁵⁴ Interviews with [REDACTED], Mr. Sodari and [REDACTED], complainants.

⁵⁵ Interviews with [REDACTED], Mr. Sodari and [REDACTED], complainants. *See also* Hearing Tape-recording, at 33. *See also* Public Hearing Formal Public Comments for Proposed Draft Hazardous Waste Permit for IWU, at 55 (Formal Comments).

⁵⁶ Interview with [REDACTED], complainant.

⁵⁷ ADEQ Response document from Steven J. Burr, Office of Special Counsel, ADEQ, to Eva Hahn, Title VI Task Force, (June 13, 2002) at 6-7.

2. ADEQ went well beyond the requirements of state and federal law in soliciting public input on the proposed permit for IWU.⁵⁸
3. The complaint fails to explain how IWU's permit will produce any adverse impact on South Phoenix. Rather, the complaint focuses on alleged defects in ADEQ's public participation process, but makes no connection between the public participation process and any negative environmental impact from IWU's permit.⁵⁹
4. ADEQ reserved its right to challenge the validity of 40 C.F.R. § 7.35(b) and (c), as exceeding EPA's authority under section 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d).⁶⁰

B. Response to Specific Allegations

1. **ALLEGATION A.1: ADEQ's Alleged Failure to Allow Spanish-Only Speakers of the South Phoenix Community to Adequately Participate in the Issuance of the IWU Permit**

Concerning the alleged statement by Mr. Clayton about citizens needing to speak English, ADEQ's Tribal and EJ Coordinator, Juanita Copeland, stated that, while she admonished Mr. Clayton for his behavior, she did not call the citizens to correct the situation.⁶¹ A few days later, when another community member called Ms. Copeland to complain about Mr. Clayton's comments and the lack of translators, Ms. Copeland assured her that translators would be made available for the hearing.⁶² In addition, Martha Seaman, the public hearing officer, was also made aware of Mr. Clayton's comments and she called Ms. Johnson to assure her that translators would be present and available to the public during the hearing.⁶³

⁵⁸ *Id.* at 7.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Interview with Juanita Copeland, ADEQ's Tribal and Environmental Justice Coordinator, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 11, 2002).

⁶² *Id.*

⁶³ Ms. Seaman stated that when she called Terry Johnson, she wasn't there. Ms. Seaman then spoke with Kory Johnson, Terry Johnson's daughter, who also works in community outreach and runs, along with her mother, Children for a Safe Environment, a grass roots non-profit group in South Phoenix.

ADEQ asserted that it did provide Spanish translators during the public hearing as evidenced by the presence of Edna Gonzalez and Tibaldo Canez at the hearing.⁶⁴ Ms. Gonzalez is a trained RCRA inspector and Mr. Canez worked in the field of hazardous waste from 1978 - 2000.⁶⁵

Mr. Canez held a pre-meeting, in Spanish, a few minutes before the public hearing began.⁶⁶ The purpose of this pre-meeting was to give Spanish speakers a brief description of the facility and the permitting process.⁶⁷ In addition to the explanation in Spanish, those who attended the pre-meeting were given a fact sheet of the facility and the permit in Spanish.⁶⁸

At the start of the hearing an announcement was made, in English only, that Mr. Canez and Ms. Gonzalez were available for translating the proceedings and/or any questions that Spanish speakers wanted to ask.⁶⁹ Ms. Gonzalez sat at the back of the room with the public hearing officer, Ms. Seaman, where public comments were recorded.⁷⁰ Ms. Gonzalez's role was to assist in the translation of Spanish comments to be entered into the official record in English. Ms. Gonzalez stated that four people asked her to translate their comments because they wanted them entered into the record as written comments.⁷¹ Mr. Canez stated that no one asked him to translate any part of the proceedings. Neither Mr. Canez nor Ms. Gonzalez think that people left the hearing because they did not know that Spanish translation was available.⁷²

⁶⁴ Interview with Greg Workman, ADEQ Ombudsman during the time of the hearing and since January 2000, Hazardous Waste Manager, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 29, 2002). Interview with Anthony Leverock, Senior Environmental Engineer in ADEQ's Hazardous Waste Division, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 31, 2002).

⁶⁵ Interview with ADEQ staff members Ms. Gonzalez and Mr. Canez.

⁶⁶ Interview with Mr. Canez.

⁶⁷ *Id.*

⁶⁸ *Id.* The fact sheet was also available to the general public, in both English and Spanish, at the registration desk.

⁶⁹ Interviews with ADEQ staff members Mr. Canez, Mr. Charles and Ms. Copeland.

⁷⁰ It was announced to the public that Ms. Gonzalez would be sitting in the back of the room. Interview with Ms. Seaman.

⁷¹ Interview with Edna Gonzalez, ADEQ staff member. It should be noted that the transcript of the public hearing formal comments only documents one instance in which a Spanish speaker's comment was translated into Spanish. *See Formal Comments*, at 47. The comment was entered by Magdaleno P. Gutierrez. It is worth noting, however, that the response document was never translated into Spanish so those who submitted comments in Spanish were unable to read the responsive document after it was issued.

⁷² Interview with Mr. Canez and Ms. Gonzalez, ADEQ staff members. Mr. Canez stated that towards the end of the evening, when things began getting redundant and the hour was getting late, people did start leaving but not at the

ADEQ did not recall providing Spanish translators or having Spanish speaking staff present at the February 9, 2000, public meeting.⁷³

According to ADEQ, it provided, at both the November 3, 1999, public hearing and the February 9, 2000, public meeting, copies of a fact sheet in English and Spanish.⁷⁴ This fact sheet contained a brief description of the facility, the type of hazardous wastes to be stored and treated at the facility, a summary of the draft permit conditions, and the procedures for reaching a final decision on the draft permit.⁷⁵ ADEQ stated that these documents were available for people as they came into the hearing or meeting.⁷⁶ In addition, ADEQ asserted that an announcement was made, in English only, at both the hearing and the meeting that fact sheets were available for the public to take home.⁷⁷

2. ALLEGATION A.2: Alleged Failure to Adequately Inform the Public of the February 2000 Meeting

ADEQ has stated that, in giving notice of the IWU November 3, 1999, public hearing, it followed the requirements found at 40 C.F.R. § 124.10 and Arizona Administrative Code R 18-8-271(I).⁷⁸ First, it sent a copy of the public notice in English to a list of addresses for property owners within a 3-mile radius of the proposed facility and to individuals who have requested to be on the mailing list for anything affecting South Phoenix.⁷⁹ Second, ADEQ published legal notices announcing the public hearing in several newspapers, each with a different kind of readership.⁸⁰ Third, ADEQ advertised the hearing on two radio stations.⁸¹

beginning of the hearing.

⁷³ Interviews with Mark Charles and Juanita Copeland, ADEQ staff members.

⁷⁴ ADEQ October 11, 2002, documental submittal, ADEQ June 13, 2002 response at 2. Interview with Mr. Workman, Ms. Copeland and Mr. Canez, ADEQ staff members.

⁷⁵ See Fact Sheet in record.

⁷⁶ Phone interview with Mark Charles, former ADEQ Deputy Director of Waste Programs, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (August 2000). Interview with Mr. Workman, Ms. Copeland and Mr. Canez, ADEQ staff members.

⁷⁷ Interview with Ms. Copeland, ADEQ staff member.

⁷⁸ ADEQ June 13, 2002 response to information request at 2.

⁷⁹ See list of addresses submitted with ADEQ's June 13, 2002, response. Interview with ADEQ staff member Mr. Leverock.

⁸⁰ ADEQ June 13 response at 2. The legal notices for the November 3, 1999, public hearing were published in (1) the Arizona Republic on September 5 and 12, 1999, a newspaper of main circulation (a copy of the September 5 ad

ADEQ points out that unlike public *hearings*, no regulation requires the advertising of public *meetings*, such as the February 9, 2000, meeting. Nonetheless, ADEQ published a legal notice about the February 9, 2000, public meeting in the *Arizona Republic* on January 23, 2000, and in *La Prensa Hispana* on January 26, 2000.⁸² In addition, ADEQ printed a flyer, in English and Spanish, announcing the public meeting; the ad was distributed, door-to-door, by ADEQ staff.⁸³ ADEQ staff also took copies of the flyers to the Mary Bethune Elementary School so that the teachers would send them home with their students. However, the teachers refused to assist in this endeavor stating that sending those flyers home was not their job.⁸⁴ Flyers were also dropped off at the local church, but it is unclear whether these flyers were actually distributed.⁸⁵

3. ALLEGATION A.3: Failure to Hold the November 3, 1999, Public Hearing at a Location Close to the Affected Community

ADEQ stated that in choosing the location for the public hearing, it followed the requirements found at Arizona Administrative Code R 18-8-270(K)(a)(3) and Arizona Revised Statutes § 49-943, which require ADEQ to hold hearings at a facility close to the affected community and at which interested members of the public can appear to present their views.⁸⁶ Among the factors that are considered in choosing a facility are the facility's floor space, parking, accessibility by the physically impaired, chair availability, restroom facilities, and air conditioning. Based on these requirements, ADEQ determined that South Mountain High School was the most convenient and adequate facility in which to hold the November 3, 1999, public

can be found in as an attachment to ADEQ's June 13 response); (2) *La Prensa Hispana* on September 30, 1999, a Spanish language newspaper with a predominantly Hispanic readership (a copy of this ad can be found in ADEQ's October 11, 2002 document submittal); (3) the *Arizona Informant* on October 20, 1999, a newspaper with a predominantly African American readership. It should be noted that the legal notice published in *La Prensa Hispana* was in Spanish.

⁸¹ *Id.* Interview with ADEQ staff member Ms. Copeland. The radio announcements were made on KFYI-AM on October 2, 1999, and KKFR-FM on October 29, 1999.

⁸² Interview with ADEQ staff member Ms. Copeland. *See also* copy of receipt dated January 27, 2000 for placement of the legal notice in *La Prensa Hispana* and copy of the Spanish-language legal notice, submitted by ADEQ on October 11, 2002. *See also* copy of January 23, 2000 legal notice in the *Arizona Republic* in the attachments to ADEQ's April 4, 2002 response.

⁸³ *See* copy of the flyer in Spanish and English in ADEQ's October 11, 2002 submittal; Interview with ADEQ staff member Ms. Copeland.

⁸⁴ Interview with ADEQ staff member Ms. Copeland.

⁸⁵ *Id.*

⁸⁶ ADEQ June 13 response at 3.

hearing.⁸⁷

According to ADEQ, it wanted to accommodate all persons who might wish to attend the public hearing, and the South Mountain High School has an auditorium than can hold 800 people and a parking lot for more than 150 cars.⁸⁸ Thus, ADEQ felt that the South Mountain High School was the most adequate facility in which to hold the public hearing because it is available to the general public, it has adequate capacity to hold a large gathering and has appropriate audio-visual capability, restroom facilities and a stage from which to conduct the hearing.⁸⁹ ADEQ indicated that transportation issues are not part of the factors considered by the Department when choosing a location for a public hearing.⁹⁰

4. **ALLEGATION A.4: Alleged Failure to Follow Proper Format at the February 2000 Meeting**

According to ADEQ, before the November 3, 1999, public hearing took place, its staff learned that the citizens of South Phoenix required additional explanations regarding IWU and the draft permit before they could feel comfortable making public comments, on the record, regarding the proposed permit.⁹¹ In order to provide the public with this additional information, ADEQ decided, on the day of the hearing, to hold a simultaneous public hearing and meeting.⁹² To accomplish this, the public hearing took place in the back of the room where Martha Seaman, along with Ms. Gonzalez and a court reporter, set up an area in which they could enter public comments on the permit into the official record.⁹³ The public meeting took place in the front of the room where ADEQ staff went over the draft permit, the IWU facility and addressed questions presented by the public.⁹⁴ Given that the ADEQ staff on the panel had planned this event as

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Interview with ADEQ staff member Mr. Workman.

⁹¹ Interview with ADEQ staff member Ms. Seaman.

⁹² *Id.* See also Hearing transcript at 3-8 and 28. Public hearings are forums in which the public enters comments into the record without receiving answers from ADEQ. The answers are responded to in writing and issued to the public when the permit is finalized. Interview with Mr. Workman and Mr. Leverock, ADEQ staff members. In contrast, public meetings are forums in which the public is free to ask questions and learn about the permitting process and facility at issue.

⁹³ Interview with Ms. Seaman, ADEQ staff member.

⁹⁴ *Id.* See also Hearing Tape-recording transcript at 3-4.

hearing, and not a question and answer session, they were not prepared to answer all questions presented to them. Thus, ADEQ decided that evening that further public meetings would be held with the citizens of South Phoenix to ensure that all their questions would be answered.⁹⁵ It was also determined that these additional public meetings would be held in the South Phoenix neighborhood.⁹⁶ In addition, the public comment period was extended to February 15, 2000, to allow for the public to enter their comments after all of the public meetings had taken place and they had learned everything they needed to know about the proposed permit.⁹⁷

ADEQ also explained that the February 9, 2000, public meeting held at the Bethune Elementary school was conducted and advertised as a meeting, *not* a hearing. The purpose of this gathering was to allow the community an opportunity to attend a meeting, within walking distance of their homes, where they could ask questions about the IWU permit, voice their concerns and submit questions.⁹⁸

5. ALLEGATION B: Alleged Misrepresentations Regarding the Outcome of the Permitting Process at the November 3, 1999, Public Hearing

ADEQ does not agree with the complainants' assertion that it misrepresented the anticipated outcome of the permit proceedings during the hearing. Rather, ADEQ stated that its job during public hearings is to listen to people's comments and make sure that they are recorded so that the permit can be adjusted to address legitimate concerns.⁹⁹ In addition, all comments submitted during the public hearing or by the end of the public comment period were considered by ADEQ before finalizing the permit.¹⁰⁰ ADEQ explained to the public, during the hearing, that no decisions would be made that night. Rather, a decision would not be made until the public

⁹⁵ The follow-up meetings were held on January 11, 2000, at Griggs Paint Company; January 13, 2000, at the Phoenix Fire Training Academy and January 27, 2000, February 1, 2000, and February 9, 2000, at the Mary Bethune Elementary School.

⁹⁶ Interview with Mr. Workman, ADEQ staff member.

⁹⁷ *Id.* The public comment period which was originally set to end on November 15, 1999, but it was extended to February 15, 2000.

⁹⁸ Interview with David Esposito, ADEQ Waste Programs Director 2/2000-5/2001 and current Assistant/Manager of ADEQ's Southern Office, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 29, 2002). Interview with Greg Workman.

⁹⁹ See Hearing Tape-recording transcript at 81 and 55.

¹⁰⁰ Interview with Mr. Workman and Mr. Leverock, ADEQ staff members.

comments were submitted.¹⁰¹

IV. METHODOLOGY OF THE INVESTIGATION

In order to assure that EPA had the necessary information to assess the allegations raised by the Center on Race, Poverty and the Environment on behalf of the IWU Negotiating Team, the Agency undertook a comprehensive effort to collect data. This included reviewing the complaint, its attachments and all correspondence exchanges between EPA, ADEQ and the complainants. EPA also submitted an Information Request to ADEQ on January 16, 2002. ADEQ submitted its response in two phases. On April 10, 2002, it sent EPA the documents requested in the Information Request and on June 13, 2002, it submitted its response and position regarding the allegations raised in the complaint.

To evaluate the allegations and the information gathered, the Agency also interviewed members of the public and ADEQ staff who attended either the November 3, 1999, public hearing or the February 9, 2000, public meeting for the IWU permit, or both. During the week of July 9-12, 2002, EPA interviewed members of the South Phoenix community who were primarily involved in submitting the complaint and who had attended the hearing, the meeting, or both public gatherings. These individuals provided EPA with their first-hand experiences at the public gatherings as well as their knowledge regarding the public participation process for the IWU permit. During the week of July 29, 2002, EPA interviewed ADEQ staff. ADEQ staff provided EPA with their perspective on how the public gatherings were conducted, an explanation on their role in the issuance of the IWU permit, and also further clarified some of the information submitted by ADEQ in its responses. In preparing this report, EPA staff also reviewed the transcripts for the hearing and the meeting as well as the Arizona State regulations pertaining to public participation processes.

V. FINDINGS OF FACT

A. ALLEGATIONS A.1-A.4: Alleged Failure to Provide Adequate Public Participation to Hispanic and African-American Residents of the Affected Area

1. ALLEGATION A.1: ADEQ's Alleged Failure to Allow Spanish-Only Speakers of the South Phoenix Community to Adequately Participate in the Issuance of the IWU Permit

1. Two community members called ADEQ prior to the November 3, 1999, public hearing to inquire about translators. They were told by Dennis Clayton that translators were not

¹⁰¹ See Hearing Tape-recording transcript at 8, 37 and 81.

required by law and that “to become a U.S. citizen your [sic] must speak English.”¹⁰²

2. Upon learning about Mr. Clayton’s comments, Martha Seaman, public hearing officer for the IWU permit, called Terry Johnson to let her know that translators would be made available during the hearing.¹⁰³ Ms. Copeland also spoke with another community member and assured her that translators would be present at the hearing.¹⁰⁴
3. ADEQ has not taken any formal steps such as issuing a memo or policy document, or providing training to its staff to ensure that actions like Mr. Clayton’s are not repeated by ADEQ staff.¹⁰⁵
4. ADEQ relies on its Spanish speaking staff for help in translations in situations where ADEQ has to deal with Spanish speakers but it has never offered or required that they take courses in translation services or technical Spanish.¹⁰⁶
5. Edna Gonzalez was not at the November 17, 1999, public hearing in the capacity of a translator. Rather, she was there as backup to the hearing administrator should Spanish be needed. Ms. Gonzalez does not routinely do translations for ADEQ, she is just asked to assist in these matters when she is available and there is a need for a Spanish speaker who also understands RCRA.¹⁰⁷
6. At the November 3, 1999, public hearing, ADEQ announced the availability of Spanish translators. That announcement was only made in English.¹⁰⁸
7. The only explanation offered by ADEQ as to why the announcement that translators were

¹⁰² Interview with Ms. Copeland, ADEQ staff member, and Ms. Johnson, complainant. *See also* letter from Children for a Safe Environment to Jacqueline Schaeffer.

¹⁰³ Interview with ADEQ staff member Ms. Seaman.

¹⁰⁴ Interview with ADEQ staff member Ms. Copeland.

¹⁰⁵ *Id.* No formal actions were taken against Mr. Clayton.

¹⁰⁶ Interview with Ms. Gonzalez, ADEQ staff member.

¹⁰⁷ *Id.*

¹⁰⁸ Complaint at 5. Interviews with Ms. Johnson and [REDACTED], complainants, and Mr. Canez, and Ms. Gonzalez, ADEQ staff members.

available was not made in Spanish was that it was an oversight on the part of ADEQ.¹⁰⁹

8. ADEQ had two Spanish speaking staff, Mr. Tibaldo Canez and Edna Gonzalez at the November 3, 1999, public hearing who could provide Spanish language translation or services if needed.¹¹⁰
9. Mr. Canez has worked in the field of hazardous waste since 1978 and during the period of the IWU permit, he was the Coordinator for ADEQ's Border Environmental Project.¹¹¹ Ms. Gonzalez is a trained RCRA inspector who worked at ADEQ's Border Programs office as the Coordinator of Hazardous Waste and Pollution Programs.¹¹²
10. A pre-meeting was held by Mr. Canez, in Spanish only, on the day of the hearing to give Spanish speakers a brief description of the facility and the permitting process.¹¹³ Five or six people attended this pre-meeting, which was held next to the registration desk for the hearing. The announcement of the pre-meeting on the day of the hearing was also made in English only.¹¹⁴
11. One Spanish speaker requested assistance in entering his comment into the written record during the November 3, 1999, public hearing.¹¹⁵
12. No translators were provided at the February 9, 2000, public meeting.¹¹⁶
13. Fact sheets describing the IWU facility and the proposed permit were available to the public, in English and Spanish, at both the public hearing and meeting.¹¹⁷

¹⁰⁹ Conversations with Steve Burr, Office of Special Counsel, ADEQ, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 9-1, 2002).

¹¹⁰ Interviews with Ms. Gonzalez, Mr. Canez, Ms. Copeland and Ms. Seaman, ADEQ staff members.

¹¹¹ Interview with Mr. Canez.

¹¹² Interview with Ms. Gonzalez.

¹¹³ Interview with Mr. Canez. None of the complainants mentioned this pre-meeting.

¹¹⁴ *Id.*

¹¹⁵ See Public Hearing For Proposed Draft Hazardous Water Permit For Innovative Waste Utilization, Formal Public Comments, at 47 (November 3, 1999).

¹¹⁶ Interviews with Mark Charles and Juanita Copeland, ADEQ staff members.

¹¹⁷ See Fact Sheet in Spanish submitted with ADEQ's October 11, 2002, response, and Fact Sheet in English submitted in ADEQ's April 23, 2002, response. Interviews with Ms. Seaman and Mr. Canez, ADEQ staff

14. ADEQ's response to the comments submitted during the public hearing period and at the other public gatherings was never translated into Spanish.
15. The facts are inconclusive regarding whether anyone left early from either the public hearing or meeting due to lack of translation.

2. ALLEGATION A.2: Alleged Failure to Adequately Inform the Public of the February 2000 Meeting

16. Public notice of permit activities, public hearings and public comment period for IWU's permit are covered by 40 C.F.R. §§ 124.10, 124.11, and 124.12, and the Arizona Administrative Code R18-8-271(I), (J) and (K).¹¹⁸

17. 40 C.F.R. § 124.10 states that:

[t]he Director shall give public notice that . . . [a] draft permit has been prepared under § 124.6(d) and [a] hearing has been scheduled under § 124.12 Public notice of the preparation of a draft permit . . . shall allow at least 45 days for public comment . . . [and] [p]ublic notice of a public hearing shall be given at least 30 days before the hearing. Public notice of activities described [above] . . . shall be given by the following methods: (1) By mailing a copy of a notice to . . . Persons on a mailing list developed by: (A) Including those who request in writing to be on the list; (B) Soliciting persons for "area lists" from participants in past permit proceedings in the area; and Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press (2)(ii) publication of a notice in a daily or weekly major local newspaper of general circulation and broadcast over local radio stations.¹¹⁹

18. Arizona Administrative Code R18-8-271(I) § 124.10 states that:

[t]he Director shall give public notice that . . . [a] draft permit has been prepared under § 124.6(d) and [a] hearing has been scheduled under § 124.12 Public notice of the preparation of a draft permit . . . shall allow at least 45 days for public comment . . . [and] [p]ublic notice of a public hearing shall be given at least 30 days before the hearing. Public notice of activities described [above] . . . shall be given by the following methods: (1) By mailing a copy of a notice to . . . Persons on a mailing list developed by: (A) Including those who request in writing to be on the list; (B) Soliciting persons for "area lists" from participants in past

members and [REDACTED] and Ms. Johnson, complainants.

¹¹⁸ See 40 C.F.R. §§ 124.10, 124.11, and 124.12, and the Arizona Administrative Code R18-8-271(I), (J) and (K)

¹¹⁹ 40 C.F.R. § 124.10

permit proceedings in the area; and Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press (2) By newspaper publication For all permits, publication of a notice in a daily or weekly major local newspaper of general circulation within the area affected by the facility or activity, at least once . . . [and] a radio announcement broadcast over 2 local radio stations broadcasted over the affected area at least once during the period 2 weeks prior to the public hearing.¹²⁰

19. 40 C.F.R. § 124.11 and Arizona Administrative Code R18-8-271(J) § 124.11 state that:

During the public comment period provided under §124.10, any interested person may submit written comments on the draft permit and may request a public hearing if no hearing has already been scheduled.¹²¹

20. 40 C.F.R. § 124.12(c) and Arizona Administrative Code R18-8-271(K) § 124.12(c) states:

Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements and the submission of statements in writing may be required. The public comment period under § 124.10 . . . shall automatically be extended to the close of any public hearing¹²²

21. ADEQ sent a copy of the public notice for the November 3, 1999, public hearing, in English only, to a list of addresses for property owners within a 3-mile radius of the proposed facility and to individuals who have requested to be on the mailing list for anything affecting South Phoenix.¹²³
22. The facts are inconclusive regarding whether notice for the public hearing was received, by mail, by any of the complainants. None of the two complainants who live within a 3-mile radius of the facility claim to have received a copy of the public notice for the November 3, 1999, public hearing in the mail. However, in the list of addresses submitted by ADEQ as the mailing list for the IWU Draft Permit Public Notice, Terry Johnson's group, "Children for a Safe Environment," is listed, as is Steve Brittle's group,

¹²⁰ Arizona Administrative Code R18-8-271(I) § 124.10

¹²¹ 40 C.F.R. § 124.11 and Arizona Administrative Code R18-8-271(J) § 124.11

¹²² 40 C.F.R. § 124.12(c) and Arizona Administrative Code R18-8-271(K) § 124.12(c)

¹²³ See list of addresses in Attachment ADEQ's June 13, 2002, response.

“Don’t Waste Arizona.”¹²⁴

23. The legal notices for the November 3, 1999, public hearing were published in English in the *Arizona Republic*, a newspaper of general circulation, on September 5 and 12, 1999, and the *Arizona Informant*, a newspaper with a predominantly African-American readership, on October 20, 1999. The legal notice was published in Spanish in *La Prensa Hispana*, a Spanish language newspaper with a predominantly Hispanic readership, on September 30, 1999.¹²⁵
24. Interviews with the complainants indicate that the complainants did not read the public notice of the hearing in any of the newspapers in which the legal notice was published.¹²⁶
25. ADEQ advertised the hearing on two radio stations: KFYI-AM on October 2, 1999, and KKFR-FM on October 29, 1999.¹²⁷
26. A preponderance of the evidence suggests that none of the complainants heard the radio announcements about the public hearing.¹²⁸
27. No regulation requires the advertising of public *meetings*, such as the February 9, 2000, meeting held at the Mary Bethune Elementary School.
28. ADEQ published a legal notice of the February 9, 2000, public meeting in the *Arizona Republic*, a newspaper of general circulation, on January 23, 2000, and in *La Prensa Hispana*, a Spanish-language newspaper, on January 26, 2000.¹²⁹
29. ADEQ printed a flyer announcing the public meeting. This flyer was printed in both

¹²⁴ *Id.*

¹²⁵ ADEQ June 13 response at 2. See copy of the September 5, 1999, ad published in the *Arizona Republic* in ADEQ’s June 13 response and attachment, copy of the September 30, 1999, ad published in *La Prensa Hispana* in ADEQ’s October 11, 2002, response and copy of the October 20, 1999, ad published in the *Arizona Informant* in ADEQ’s January 30, 2003, fax.

¹²⁶ Interviews with [REDACTED], Mr. Sodari, [REDACTED], and [REDACTED], complainants.

¹²⁷ ADEQ June 13, 2002 response at 2. Neither of these radio stations are Spanish language stations.

¹²⁸ When asked during their interviews, none of the complainants stated that they had heard radio announcements about the November 3, 1999, public hearing.

¹²⁹ Interview with Ms. Copeland. See also copy of receipt dated January 27, 2000, for placement of ad in *La Prensa Hispana* and copy of the ad, submitted by ADEQ on October 11, 2002. See also copy of January 23, 2000, ad in the *Arizona Republic* in the attachments to ADEQ’s April 4, 2002 response.

English and Spanish and was distributed, door-to-door, by ADEQ staff.¹³⁰

30. Copies of the Spanish/English flyer announcing the public meeting were also taken to the Mary Bethune Elementary School so that the teachers would send them home with the students. However, the teachers refused to assist in this endeavor stating that sending those flyers home was not their job.¹³¹
31. Flyers were dropped off at the local church, but it is unclear whether these flyers were actually distributed.¹³²
32. One of the complainants, Terry Johnson, printed flyers in English and Spanish announcing the meeting and then delivered them throughout the South Phoenix area, door-to-door.¹³³

3. ALLEGATION A.3: Failure to Hold the November 3, 1999, Public Hearing at a Location Easily Accessible by the Affected Community

33. The requirements for selecting the location of a public hearing are found at A.R.S. § 49-943, which requires ADEQ to:

Hold a public hearing at least thirty days before a final decision concerning the permanent site if such a hearing is warranted by the public interest, to be held in the nearest public facility in the general vicinity of the proposed permanent site, at which interested persons may appear and present their views.”¹³⁴ “To meet this criterion, the hearing location must be 1) available to the general public, including the physically impaired, and 2) have adequate capacity (e.g. chairs, floor space, parking and other factors).¹³⁵

34. A.A.C. R 18-8-271(K)(a)(3) requires that “[w]henver possible the Director shall

¹³⁰ Interview with Ms. Copeland. See copy of public notice flyer in ADEQ’s October 11, 2002, document submittal.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Interview with Ms. Johnson, complainant. Ms. Johnson undertook this activity along with [REDACTED].

¹³⁴ A.R.S. § 49-943.

¹³⁵ ADEQ June 13 response at 3.

schedule a hearing . . . at a location convenient to the nearest population center to the proposed facility.”¹³⁶

35. The distance between the IWU facility and South Mountain High School is 3.7 miles.¹³⁷
36. To get from South Phoenix to South Mountain High School on public transportation, residents had to take three buses.¹³⁸ This trip can take up to an hour and a half given the wait between buses if they are running according to schedule.¹³⁹
37. At the time of the hearing, public buses in Phoenix stopped running around 8-8:30 P.M.¹⁴⁰ Since the meeting ran until 10:00 P.M., those relying on public transportation had to miss part of the hearing, including the portion of the meeting allotted for public comments.¹⁴¹
38. The facts are inconclusive regarding whether some attendees had to leave the public hearing early in order to catch the last bus back to their neighborhood.¹⁴²
39. Transportation issues are not considered by ADEQ in selecting locations for public hearings, although in 1999 ADEQ did provide buses for a public hearing regarding a RCRA permit for Heritage Environmental Services, LLC.¹⁴³
40. South Mountain High School has an auditorium than can hold 800 people and a parking

¹³⁶ A.A.C. R 18-8-271(K)(a)(3).

¹³⁷ Distance driven by Kent Benjamin, EPA Title VI Task Force (August 2002).

¹³⁸ Interviews with [REDACTED] and [REDACTED], complainants.

¹³⁹ *Id.*

¹⁴⁰ Interview with [REDACTED]. EPA learned during the interviews that the City of Phoenix has been working to extend the running time of its public transportation.

¹⁴¹ Interviews with Mr. Sodari, [REDACTED] and [REDACTED], complainants.

¹⁴² EPA was unable to interview individuals who failed to attend the hearing because of transportation difficulties. However, one complainant stated that two individuals she knows did not attend the November 3, 1999, public hearing because the location was too far from their homes. Interview with [REDACTED]. *See also* Hearing Tape-recording transcript, at 32. [REDACTED] stated at the hearing: “I’d like to know why is this public hearing being held so far away from the affected area. There’s a school right in the neighborhood. Last night we marched through that neighborhood and people said, ‘I can’t go tomorrow night because I don’t have a car and the buses won’t be running by the time it’s time to go home.’”

¹⁴³ Interview with ADEQ staff member Greg Workman. *See* EPA File No: 19R-99-R9.

lot for more than 150 cars.¹⁴⁴ The high school also has appropriate audio-visual capability, restroom facilities and a stage from which to conduct the hearing.¹⁴⁵

41. ADEQ expected over 200 people to attend the hearing given the interest on this matter.¹⁴⁶ Ultimately, approximately 680 people attended the hearing.¹⁴⁷
42. ADEQ staff determined that the Bethune Elementary School would be uncomfortable because the seating available was for children, not adults.¹⁴⁸
43. The Mary Bethune Elementary School can accommodate fewer than 250 people and its parking lot can hold approximately 50 cars.¹⁴⁹ This school is in walking distance to many South Phoenix residents and the community has often used it for community meetings.¹⁵⁰
44. The Mary Bethune Elementary School was used for the February 9, 2000, public meeting.¹⁵¹
45. The only negative comment on the use of the Mary Bethune Elementary School by an ADEQ staff member was that the air in the neighborhood had a fat-burning smell. "There

¹⁴⁴ ADEQ June 13 response at 3.

¹⁴⁵ *Id.*

¹⁴⁶ ADEQ personnel were aware that the IWU permit was controversial in the community so they expected a large turnout for the hearing. Thus, ADEQ chose to hold the hearing at a location that could hold the largest number possible of attendees. See February 7, 2003, fax from Steven J. Burr, ADEQ Special Counsel, to Eva Hahn, Title VI Task Force, in response to EPA's query as to why ADEQ expected over 200 individuals to attend the IWU November 3, 1999, public hearing (ADEQ February 7, 2003, fax).

¹⁴⁷ *Id.* ADEQ stated that relatively few attendees signed the attendance sheet. However, ADEQ personnel estimated "that no more than 15% of the seats in the SMHS Auditorium were empty the night of the hearing. If that is correct, then attendance was over 680, and holding the hearing at Mary Bethune would have been a disaster."

¹⁴⁸ Interview with Ms. Copeland. The Mary Bethune school is an elementary school and the seats available during for meetings are child-sized.

¹⁴⁹ *Id.* Title VI Task Force members Eva Hahn and Kent Benjamin visited the school during the week of July 12, 2002 and confirmed the capacity of the school.

¹⁵⁰ Complaint at 5 and interview with Mr. Sodari, complainant. Title VI Task Force members Eva Hahn and Kent Benjamin visited the school during the week of July 12, 2002 and confirmed the proximity of the school to the local residences.

¹⁵¹ *Id.*

was an odor. I guess there was a . . . rendering facility nearby and the stench was horrendous.”¹⁵²

46. The South Phoenix neighborhood has two gyms that could have also been used to hold the public hearing. Both the Harmond Park and Grant Park gyms can be set-up for meetings of more than 250 people.¹⁵³ ADEQ did not consider these facilities as an alternative location to the South Mountain High School.¹⁵⁴
47. ADEQ held additional public meetings to address the concerns of the community.¹⁵⁵ These meetings were held on January 11, 2000, at Griggs Paint Company; January 13, 2000, at the Phoenix Fire Training Academy and January 27, 2000, February 1, 2000, and February 9, 2000, at the Mary Bethune Elementary School.¹⁵⁶
48. ADEQ extended the public comment period, which was originally set to end on November 15, 1999, to February 15, 2000. This was done so that the South Phoenix residents would have enough time to enter their comments after the January-February 2000 meetings had ended.¹⁵⁷

4. ALLEGATION A.4: Alleged Failure to Follow Proper Format at the February 2000 Meeting

49. ADEQ decided, on the day of the hearing, to hold a simultaneous public hearing and meeting to address the community’s need for additional explanations regarding IWU, the proposed permit and the permitting process.¹⁵⁸ In addition, ADEQ explained to the public, repeatedly, that whatever questions they could not answer at the hearing they

¹⁵² Interview with ADEQ staff member Ms. Copeland. A common complaint we heard from area residents is that their neighborhood always has a smell, it just varies depending on the activities of the local industries.

¹⁵³ Complaint at 5 and interview with Mr. Sodari, complainant. Task Force members Eva Hahn and Kent Benjamin visited these facilities during the week of July 12, 2002, and determined that they would have been adequate hearing and meeting facilities.

¹⁵⁴ Interview with ADEQ staff member Ms. Copeland.

¹⁵⁵ Interview with ADEQ staff member Mr. Workman and Hearing Tape-recording transcript at 56.

¹⁵⁶ See ADEQ June 13 response at 4.

¹⁵⁷ Interview with Mr. Workman. See also Hearing Tape-recording transcript at 56.

¹⁵⁸ Interview with Ms. Seaman. See also Hearing Tape-recording transcript at 3-4.

would answer at the subsequent public meetings.¹⁵⁹

50. ADEQ structured the public hearing to address what it perceived to be the needs of the community.¹⁶⁰ However, the simultaneous hearing/meeting format produced confusion on the part of some members of the community.¹⁶¹
51. The February 9, 2000, public meeting held at the Bethune Elementary school was conducted and advertised by ADEQ as a meeting, *not* a hearing.¹⁶²
52. The public comment period which was originally set to end on November 15, 1999, was extended to February 15, 2000.

B. ALLEGATION B: ADEQ's Alleged Misrepresentations Regarding the Outcome of the Permitting Process

53. ADEQ's responsibility during public hearings is to listen to people's comments to make sure that they are recorded so that the permit can be adjusted to address legitimate concerns.¹⁶³
54. ADEQ made several changes to the final permit based on the comments submitted by the public during the public comment period.¹⁶⁴
55. EPA was unable to uncover any evidence that ADEQ stated that the permit would be issued regardless of the comments submitted by the public. Rather, the transcripts for both the public hearing and the public meeting clearly indicate that ADEQ repeatedly told the public that the purpose of the proceedings and the public comment period was to take

¹⁵⁹ Hearing Tape-recording transcript at 56.

¹⁶⁰ Hearing Tape-recording transcript at 3-4.

¹⁶¹ Interviews with [REDACTED] and Julian Sodari.

¹⁶² Interview with ADEQ staff member Greg Workman. *See also* copy of receipt dated January 27, 2000 for placement of the legal notice in *La Prensa Hispana* and copy of the Spanish-language legal notice, submitted by ADEQ on October 11, 2002. *See also* copy of January 23, 2000 legal notice in the *Arizona Republic* in the attachments to ADEQ's April 4, 2002 response.

¹⁶³ *See* Hearing Tape-recording transcript at 81 and 55.

¹⁶⁴ Final Permit Decision and Response to Comments, Innovative Waste Utilization, EPA ID No. AZD980892731, April 12, 2001, comments number 19, 29, 31, 35, 58, 147, 160, and 169.

into account the questions and concerns of the community before finalizing the IWU permit.¹⁶⁵

VI. ANALYSIS AND RECOMMENDED DETERMINATION

A. Response to ADEQ's General Arguments Urging Dismissal of the Complaint

1. Argument that the Center Lacked Standing

In its initial response to the complaint, ADEQ stated that the Complaint was not brought by the affected community so there is "no basis for concluding that [the Center for Race, Poverty and the Environment] represents the South Phoenix Community."¹⁶⁶ ADEQ further stated that the attorneys who signed the complaint do not indicate in the complaint "whether they are acting as legal counsel for the 'IWU negotiating team,' or any resident or group residing in South Phoenix."¹⁶⁷ Thus, according to ADEQ, there is no basis for concluding that the Center represents the South Phoenix Community.

ADEQ is incorrect in its argument that the Center did not assert itself as the authorized representative of the Complainants. The August 7, 2000, complaint demonstrates, in the signature page, that Mr. Cole and Ms. Farrell, attorneys with the Center, signed the complaint as "Attorneys for the Complainants."¹⁶⁸ Moreover, the Supplemental Comments document submitted by the Center explicitly states, in its opening paragraph, that "[t]he Center on Race, Poverty and the Environment submits these supplemental comments on behalf of the IWU Negotiating Team to provide additional information regarding their initial complaint against the Arizona Department of Environmental Quality."¹⁶⁹ It is also worth noting that one of the Center's specialties is to represent minority communities in Title VI complaints filed with EPA. Thus, ADEQ's argument that the complaint at issue lacks standing because the Center does not represent the Complainants is not valid.¹⁷⁰

¹⁶⁵ Hearing Tape-recording transcript at 9, 37 and 81. *See also* Public Comment, Reporter's Tape-recording transcript of Proceedings, February 9, 2000, at 4, 11, and 14.

¹⁶⁶ ADEQ's June 13 response at 6.

¹⁶⁷ *Id.*

¹⁶⁸ Complaint at 7.

¹⁶⁹ Supplemental Comments at 1.

¹⁷⁰ *See also* 40 C.F.R. § 7.120(a) which describes who may file a complaint.

2. Argument that ADEQ Complied with Federal and State Public Participation Requirements

As a second general defense, ADEQ stated that it went well beyond the requirements of state and federal law in soliciting public input on the proposed permit for IWU, and therefore, the complaint should be dismissed. Even accepting this proposition as true does not warrant dismissal of the complaint. Compliance with federal or state environmental permitting requirements does not necessarily mean that a recipient, such as ADEQ, has complied with Title VI.¹⁷¹ The purpose of EPA's investigation was to determine whether ADEQ complied with Title VI and EPA's Title VI regulations in the permitting process for the IWU permit. In particular, EPA focused on whether ADEQ's procedures provided access to the permitting process for the Hispanic and African American community to the same extent as the rest of the community.

3. Argument that there is No Connection Between the Public Process and Negative Environmental Impacts

ADEQ argued that the complaint fails to explain how IWU's permit will produce any adverse impact on South Phoenix. ADEQ claimed that the complaint makes no "connection between the public participation process and any negative environmental impact from IWU's permit . . . [and that] evidence of such causation is a fundamental requirement of a disparate impact claim."¹⁷² However, Title VI prohibits discrimination on the basis of race, color, or national origin in "any program or activity receiving Federal financial assistance."¹⁷³ ADEQ operates its public participation process as one of its programs or activities. Consequently, Title VI offers protection from discrimination in that process. Furthermore, EPA has interpreted this complaint as alleging intentional discrimination, not disparate impact. Accordingly, this argument is unfounded.

4. Arguments that EPA Regulations are Not Valid

ADEQ reserved the right to challenge the validity of EPA's disparate impact regulations at 40 C.F.R. § 7.35(b) and (c), as exceeding EPA's authority under section 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d).

As noted above on p. 5, EPA has construed this complaint as alleging intentional discrimination, not disparate impact. However, even if ADEQ exercised its right to challenge

¹⁷¹ Cf. *U.S. v. Phoenix Union H.S. Dist.*, 681 F.2d 1235, 1238 (9th Cir. 1982) (holding that state statutory requirements are "preempted to the extent [they] frustrate[] the congressionally mandated duty to investigate whether public programs receiving federal funds are complying with Title VI.")

¹⁷² ADEQ June 13 response at 7.

¹⁷³ 42 U.S.C. § 2000d.

EPA's regulations prohibiting disparate impacts, the Supreme Court has recognized that federal agency regulations that prohibit disparate impacts are valid, even if the challenged practices are not intentionally discriminatory.¹⁷⁴

B. Analysis of Specific Allegations

EPA's investigation of this complaint revealed no direct evidence of intentional discrimination. Accordingly, EPA employed the burden-shifting analysis of *McDonnell Douglas Corp. v. Green* to analyze complainants' allegations of intentional discrimination. In addition, where appropriate, EPA also applied the *Arlington Heights* test for circumstantial evidence of intent to carry the burden of proof.

Using the *McDonnell Douglas* analysis, the first two prongs of a *prima facie* case are met for all of the allegations in the complaint. The Center on Race, Poverty and the Environment represents African American and Hispanic residents of South Phoenix who are members of a protected class under Title VI on the basis of race and national origin respectively. As residents of South Phoenix, Arizona, the complainants were, at all times relevant to their complaint, eligible to receive the benefits of ADEQ's environmental programs and policies. South Phoenix falls within the recipient's jurisdiction, and the program at issue is one that is intended to benefit these claimants.

EPA must now analyze the last two prongs of this test: (1) whether the complainants did not receive the benefits to which they were entitled; and (2) whether similarly situated individuals, who are not members of their protected class, did receive the benefits. If these elements are established, the Agency must determine whether the burden of proof is established with circumstantial evidence. As discussed below, the allegations of intentional discrimination either fail to satisfy the last two prongs of the *McDonnell Douglas* test or lack sufficient circumstantial evidence to carry the burden of proof under *Arlington Heights*.

As noted in section I.C., above, the allegations pertaining to November 3, 1999, are untimely and therefore, are being rejected. Nonetheless, they are reviewed here as background to the timely allegations.

1. ALLEGATION A.1: ADEQ's Alleged Failure to Allow Spanish-Only Speakers of the South Phoenix Community to Adequately Participate in the Issuance of the IWU Permit

Access to public participation proceedings regarding the IWU permit is a benefit available under ADEQ's RCRA permit program. ADEQ was fully aware that certain members of the community in which IWU was situated would not have access to these proceedings, absent Spanish translation. In conducting the intentional discrimination analysis in this Investigative

¹⁷⁴ See *Guardians*, 463 U.S. at 582; *Alexander*, 469 U.S. at 293.

Report, the Agency assumes, as a threshold matter, that ADEQ's failure to provide Spanish language translation services might have been a proxy for intentional discrimination against Hispanics or African Americans.¹⁷⁵

Evidence of ADEQ's knowledge of the need for Spanish language translators can be found at several points in time prior to the February 2000 public meeting. On September 2, 1999, a request was made within ADEQ to translate the public notice of the IWU hearing into Spanish. The public notice was to be published in a Spanish language newspaper because the area in which the facility proposed to operate was located in South Phoenix, which is largely populated by Spanish speaking persons.¹⁷⁶ On September 30, 1999, ADEQ published a public notice in Spanish in *La Prensa Hispana*, a Spanish language newspaper with a predominantly Hispanic readership announcing the November 3, 1999, public hearing.¹⁷⁷ ADEQ provided fact sheets in both English and Spanish, describing the facility and the proposed permit, at both the hearing and the meeting.¹⁷⁸

In advance of the November 1999 public hearing, two South Phoenix residents called ADEQ to specifically request that Spanish translators be made available during the hearing. Instead of complying with this request, an ADEQ staff member misstated the law and told them that their requested would be denied.¹⁷⁹ After this incident, however, ADEQ staff members and community representatives spoke again and provided assurance that translators would be made available for the hearing.¹⁸⁰

EPA's investigation revealed that two ADEQ staff members who are fluent in Spanish attended the November 3, 1999, public hearing to assist with translation, if requested.¹⁸¹ In

¹⁷⁵ The Agency recognizes that language-based actions, such as failure to provide translation services, may serve as a proxy for intentional race- or national origin based discrimination. See U.S. Department of Justice, *Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance*, 65 Fed. Reg. 50,123, 50,124 n. 8 (2000) (citing *Hernandez v. New York*, 500 U.S.352, 370 (1991) (plurality opinion)).

¹⁷⁶ See ADEQ Internal Memorandum from Tibaldo Canez to Fidel Carrillo.

¹⁷⁷ Finding of Fact 23.

¹⁷⁸ Finding of Fact 13.

¹⁷⁹ Finding of Fact 1.

¹⁸⁰ Finding of Fact 2.

¹⁸¹ Finding of Fact 8. It should be noted that while ADEQ relies on its Spanish speaking staff to assist it in situations where Spanish language is needed, none of these individuals have received special training in translation services. See Finding of Fact 4.

addition, one of the translators held a pre-meeting, in Spanish, to give background information on the IWU facility and draft permit to Spanish speakers.¹⁸² However, the announcement that translators were available during the hearing and that a pre-meeting was to be held was made only in English.¹⁸³ The evidence indicates that, in spite of the English-only announcements, some Spanish-only speakers were able to avail themselves of the interpretation assistance offered. However, EPA's investigation could not determine how many Spanish-only speakers failed to learn about the availability of these services. Witnesses claim to have seen some Spanish-only speakers leave the hearing,¹⁸⁴ and the hearing transcript shows concern on the part of English speakers that their Spanish-speaking neighbors were disadvantaged by the lack of translation assistance throughout the permitting process.¹⁸⁵ ADEQ could not explain why the announcements regarding the pre-meeting and availability of translators were made in English only.¹⁸⁶

A preponderance of the evidence developed in EPA's investigation shows that ADEQ failed to have Spanish interpreters at the February 9, 2000, public meeting,¹⁸⁷ thereby disadvantaging the Spanish-only speakers of South Phoenix.¹⁸⁸

However, the majority of circumstantial evidence fails to support a finding of intentional discrimination against Hispanics or African Americans. The administrative history and sequence of events leading up to the meeting indicate that ADEQ took haphazard, but affirmative steps to assist Spanish speakers during the meeting process. As noted above, ADEQ conducted a pre-meeting before the November 1999 hearing in Spanish, provided interpreters at that hearing, and offered fact sheets translated into Spanish at both the hearing and meeting. These efforts to help Spanish speakers, while not wholly satisfactory, belie the allegation that ADEQ intentionally discriminated against Complainants.

The misstatement of law by Dennis Clayton of ADEQ concerning the mandatory use of English constitutes some circumstantial evidence of intent. However, the subsequent actions by Martha Seaman, the public hearing officer, to clarify to the community that interpreters would be

¹⁸² Finding of Fact 10.

¹⁸³ Finding of Fact 6 and 10.

¹⁸⁴ Finding of Fact 15.

¹⁸⁵ See footnote 28 and Finding of Fact 1.

¹⁸⁶ Finding of Fact 9.

¹⁸⁷ Finding of Fact 12.

¹⁸⁸ EPA was unable to obtain information regarding Spanish translation at the other public meetings.

available, provides some offsetting evidence.

Ultimately, the failure to have interpretation services available at the public meeting appears to have been the result of administrative oversight. It seems that ADEQ's efforts were poorly coordinated in large measure because ADEQ lacks a uniform policy and procedures on translation and interpretation. For example, ADEQ provided (1) interpreters at the November 1999 hearing, but neglected to announce their presence in Spanish; (2) documents translated in Spanish at both the hearing or meeting, but failed to adequately inform the participants about their availability; and (3) conflicting messages about whether interpreters would be available at the November 1999 hearing.

The efforts made by ADEQ to accommodate the needs of these residents during the IWU meeting were weak, but taken as a whole, they indicate a lack of intent to discriminate on the basis of race or national origin. Consequently, EPA cannot make a finding of violation for this allegation.

2. ALLEGATION A.2: Alleged Failure to Adequately Inform the Public of the February 2000 Meeting

Public notice of permit activities, public hearings and public comment period are covered by the relevant environmental laws at 40 C.F.R. §§ 124.10, 124.11 and 124.12 and the Arizona Administrative Code R18-8-271(I), (J) and (K).¹⁸⁹ According to these regulations, public notice of public hearings can be accomplished by: 1) direct mailing of the notice to persons on a mailing list, both those who have requested to be on the list and those living within a three mile radius of the facility; 2) by newspaper publication in a major newspaper of general circulation; and 3) by radio announcement broadcast over two local radio stations in the affected area. Public notice must be made 30 days prior to a public hearing and the public comment period must last at least 45 days. There is no requirement for the distribution of flyers.¹⁹⁰

ADEQ mailed copies of the public notice for the November 3, 1999, public hearing, to individuals who had requested to be on the mailing list for issues affecting South Phoenix and to property owners within a 3-mile radius of the facility. In its document submission ADEQ provided copies of the public notice and a list of addresses to which the notice was mailed.¹⁹¹ Only two of the complainants interviewed by EPA appeared on this list.¹⁹²

¹⁸⁹ See Findings of Fact 16-20.

¹⁹⁰ *Id.*

¹⁹¹ Finding of Fact 21.

¹⁹² See Mailing List for Innovative Utilization LLC. Draft Permit Public Notice and Finding of Fact 21.

However, the complainants had several other means through which to learn about the public hearing. ADEQ advertised the public hearing, on a timely basis, through legal notices published in three different newspapers which, when combined, cover the whole readership base of South Phoenix. These newspapers were considered to be responsive to the needs of the Latino and African-American populations.¹⁹³ In addition, ADEQ advertised the hearing on two radio stations, well in advance of the hearing.¹⁹⁴

ADEQ published advanced notice of the February 2000 meeting in the *Arizona Republic*¹⁹⁵ and distributed flyers announcing the meeting, throughout the neighborhood.¹⁹⁶ The flyer advertised the meeting in both English and Spanish. ADEQ staff also took copies of the flyers to the Mary Bethune Elementary School and the local churches for distribution.¹⁹⁷

Although ADEQ attempted to publicize the meeting, notice did not reach many of complainants. However, the circumstantial evidence provides no basis to find that this failure of notice was attributable to intentional discrimination by ADEQ. The administrative history and sequence of events leading up to the meeting indicate that ADEQ took reasonable steps to assist Spanish speakers during the hearing and meeting process. Prior to the November 3, 1999, hearing, ADEQ mailed notices to many interested persons, published notice of the hearing in a Spanish language newspaper and two English language newspapers, and advertised the hearing on two radio stations. Prior to the February 2000 meeting, ADEQ distributed notice of the meeting door-to-door in Spanish and English, and provided copies of those notices to schools and a church.

For the November 3, 1999, hearing, ADEQ's efforts satisfied all customary procedures. As mentioned above, ADEQ complied with its legal requirements under the environmental laws for providing notice of the hearing. For the February 2000 meeting, ADEQ significantly exceeded the legally mandated procedures. In fact, the environmental laws did not require any notice of the meeting, but ADEQ undertook considerable efforts to provide notice to the community.

The evidence developed in EPA's investigation is inadequate to establish whether problems with notice adversely and disparately impacted Hispanics or African Americans. Nonetheless, the affirmative steps taken by ADEQ are contradictory to any intent to discriminate.

¹⁹³ Findings of Fact 23.

¹⁹⁴ Finding of Fact 25.

¹⁹⁵ Finding of Fact 28.

¹⁹⁶ Finding of Fact 29.

¹⁹⁷ Finding of Fact 30.

In fact, even assuming a disparate impact, ADEQ's attempts to notify the public about both the hearing and the meeting clearly indicate that they did not intend to discriminate.

ADEQ took numerous steps to provide notice of the meeting. While those efforts may not have succeeded in notifying everyone about the meeting, they provide strong circumstantial evidence that ADEQ did not intend to discriminate. Consequently, EPA cannot make a finding of violation for this allegation.

3. ALLEGATION A.3: Failure to Hold the November 3, 1999, Public Hearing at a Location Easily Accessible by the Affected Community¹⁹⁸

ADEQ is subject to the requirements for determining an adequate location for a public hearing which are found at A.A.C.R. 18-8-270(K)(a)(3).¹⁹⁹ This regulation specifies that a public hearing be held at a location convenient to the nearest population center to the proposed facility.²⁰⁰ A.R.S. § 49-943 requires ADEQ to hold hearings at "the nearest public facility in the general vicinity of the proposed permanent site, at which interested persons may appear and present their views."²⁰¹ ADEQ interprets these rules to require that the chosen location must: 1) be available to the general public, including the physically impaired and 2) have adequate capacity to allow the public participants to present their views.²⁰² Among the factors considered are the facility's floor space, parking, accessibility, chair availability, restroom facilities, and air conditioning.²⁰³ In the course of the investigation, ADEQ informed EPA that transportation issues are not among the factors considered by the Department when choosing a location for a public gathering.²⁰⁴

However, the plain text of Arizona's environmental regulations requires that public hearings "be held at a location convenient to the nearest population center to the proposed

¹⁹⁸ As noted above, allegations pertaining to the November 1999 hearing are untimely, so information related to those allegations are provided for background purposes.

¹⁹⁹ Finding of Fact 34.

²⁰⁰ *Id.*

²⁰¹ Finding of Fact 33.

²⁰² ADEQ June 13 response at 3.

²⁰³ *Id.*

²⁰⁴ Finding of Fact 39.

facility.”²⁰⁵ The November 3, 1999, public hearing for the IWU permit was held at the South Mountain High School, approximately 3.7 miles from the South Phoenix community,²⁰⁶ a location which is not readily accessible from South Phoenix by public transportation or within reasonable walking distance.²⁰⁷ South Phoenix has adequate facilities to accommodate the public hearing and there was no apparent reason for to locate the hearing at such a distance from the community.

ADEQ did take steps to remedy the problem. ADEQ acknowledged the transportation difficulties, as well as the need of the South Phoenix community for additional time to learn about and comment on the proposed permit. Therefore, ADEQ held a series of meetings in the affected community to ensure adequate participation in the permitting process by the residents of South Phoenix.²⁰⁸

The Mary Bethune Elementary School was used for the February 9, 2000, public meeting.²⁰⁹ This meeting was the last in a series of six meetings held in January 2000, and February 2000, to address the deficiencies of the public hearing.²¹⁰

4. ALLEGATION A.4: Alleged Failure to Follow Proper Format at the February 2000 Meeting

EPA’s investigation confirmed that the November 3, 1999, public hearing was not conducted strictly as a hearing; instead, the format was changed to accommodate the needs of the

²⁰⁵ Finding of Fact 34.

²⁰⁶ Finding of Fact 35.

²⁰⁷ Finding of Fact 35-37. ADEQ could have afforded the South Phoenix community the same assistance as it did to the residents of Randolph, Arizona a year earlier. On November 17, 1998, ADEQ provided free transportation to the residents of Randolph, Arizona, a predominantly African American community, so that they could attend a hearing, regarding a RCRA permit for Heritage Environmental Services, LLC. This hearing was held in Coolidge, Arizona, which is approximately four miles from Randolph. Interview with ADEQ staff member Ms. Copeland. *See also* August 6, 1999, civil rights complaint filed by Luke Cole, with the U.S. Environmental Protection Agency, Office of Civil Rights, on behalf of Community United for Political and Individual Development of Randolph, Arizona. EPA File No: 19R-99-R9. In the course of EPA’s investigation ADEQ staff was unable to explain why these two situations were handled differently. *See* Finding of Fact 39.

²⁰⁸ Finding of Fact 47.

²⁰⁹ Finding of Fact 44.

²¹⁰ Finding of Fact 47.

community.²¹¹ On the day of the hearing ADEQ staff learned that the citizens of South Phoenix required additional explanations regarding IWU and the draft permit in order to feel comfortable making public comments, on the record, regarding the proposed permit.²¹² To accomplish the goals of the hearing, taking public comments, and giving the community additional time to ask questions, ADEQ held a simultaneous public hearing and meeting.²¹³ The public hearing was moved to the back of the room where the hearing officer, Ms. Seaman, was able to enter public comments into the record,²¹⁴ while a public meeting was held in the front of the room where ADEQ staff explained the draft permit and answered questions presented by the public.²¹⁵ Because of this late and unexpected change in plans, ADEQ was unprepared to handle the evening as a public meeting in which the public would be asking questions and expecting immediate answers.

As the evening progressed, ADEQ realized that the residents of South Phoenix felt misinformed and unable to adequately comment on the proposed permit. As a result, ADEQ decided to hold a series of public meetings in locations within the community, which members of the community could attend to ask questions about the IWU permit, voice their concerns, and submit comments.²¹⁶ These meetings took place during January and February 2000. In addition, the public comment period was extended to February 15, 2000, to allow the public the opportunity to enter their comments after all of the public meetings had taken place and they had learned everything they needed to know about the proposed permit.²¹⁷ ADEQ's agreement to extend the public comment period and to hold additional meetings for the South Phoenix indicates a recognition by ADEQ of the need to offer more assistance to the public regarding the IWU permit and to address the community's concerns.

The most widely attended of the public meetings held during the January-February 2000, period was the one held at Mary Bethune Elementary School. This meeting was the last in the series before the end of the public comment period; both the community and ADEQ increased their efforts to inform the residents about the meeting.²¹⁸ During this meeting, ADEQ reviewed

²¹¹ See reference to this in Public Comment, Reporter's Transcript of Proceedings, February 9, 2000, at 3.

²¹² Interview with Ms. Seaman.

²¹³ Finding of Fact 49.

²¹⁴ Interview with Ms. Seaman.

²¹⁵ Interview with Ms. Seaman and Finding of Fact 49.

²¹⁶ Finding of Fact 47.

²¹⁷ Findings of Fact 48 and 52.

²¹⁸ Findings of fact 46, 51 and 52.

the ideas and suggestions that had been brought up during the previous five meetings.²¹⁹ Questions that had been prevalent throughout the previous meetings were addressed again and ADEQ answered additional questions brought up that evening by the public.²²⁰ In addition, ADEQ prepared a handout addressing major issues and questions brought up by the public throughout the two months of meetings.²²¹ IWU staff was also available at the meeting to address issues raised by the community and to give an overview and history of the facility and IWU's purchase and operation of the facility.²²² While ADEQ staff did talk for a while during the meeting, it is clear from the transcript that they spent most of the time answering questions posed by the public. Moreover, the period given to the public to enter comments into the record was the longest period of the evening, lasting approximately one and a half hours.²²³

It is important to emphasize for purposes of this analysis that this gathering was advertised and conducted as a meeting, *not* a hearing. Thus, the purpose was to allow the community members an opportunity to attend a meeting, within walking distance of their homes, where they could ask questions about the IWU permit, voice their concerns and submit questions.²²⁴ At the meeting, time was allotted for public comment for those in the community who felt ready to enter their comments into the record. In addition, the public comment period ended a few days after this meeting, which gave the public a last chance to ask questions and think about the issues before submitting their comments.²²⁵

It is also important to note that the public was able to enter comments into the record at all of the public meetings held in January and February.²²⁶ The procedure for entering comments at the meetings was explained at the meetings and the procedure for submitting comments by

²¹⁹ Public Comment, Reporter's Transcript of Proceedings, February 9, 2000, at 3-12.

²²⁰ *Id.* at 5-12.

²²¹ *Id.* at 5. While EPA does not have a copy of this document, the transcript of the proceedings clearly indicates that the speaker asked the public to follow the handout with him.

²²² *Id.* at 27-50. The IWU representatives were [REDACTED] and [REDACTED].

²²³ *Id.* at 50-107.

²²⁴ Interview with David Esposito, ADEQ Waste Programs Director 2/2000-5/2001 and current Assistant/Manager of ADEQ's Southern Office, by Eva Hahn and Kent Benjamin, EPA Title VI Task Force (July 29, 2002). Interview with Greg Workman.

²²⁵ Interview with Greg Workman. The public comment period which was originally set to end on November 15, 1999, was extended to February 15, 2000. *See* Public Comment, Reporter's Transcript of Proceedings, February 9, 2000, at 4, Public Notice of the Meeting in *La Prensa Hispana* (January 26, 2000) and English-language Public Notice flyer announcing the meeting.

²²⁶ Public Comment, Reporter's Transcript of Proceedings, February 9, 2000, at 3-11.

mail was explained in the fact sheet that was distributed at the hearing and all the meetings.²²⁷ The public was also informed that the document responding to their comments would be made available to anyone who attended the meetings and anyone else who requested a copy of the document.²²⁸

Although the format of the November 3, 1999, public hearing was changed, in a manner that the community found confusing, ADEQ's subsequent actions gave the complainants ample opportunity to participate in the permitting process for IWU. Whatever deficiencies may have occurred during the public hearing, they were corrected by the end of the February 9, 2000, public meeting, so that the public could enter comments into the record, by the end of the public comment period, February 15, 2000. Thus, ADEQ provided the complainants with the benefit they claim to have been denied: the right to fully participate in public meetings regarding the IWU permit which were structured to their needs.

It is clear, by a preponderance of the evidence, that a *prima facie* case of intentional discrimination has not been made based on the alleged failure to follow the proper format at the public hearing and meeting. Thus, this report recommend a finding of no violation of Title VI for this allegation.

5. Conclusion

Although EPA's investigation provided no basis to recommend findings of discrimination with respect to ADEQ's handling of the public participation process for the IWU permit, this report suggests certain recommendations, found in Section VII for ADEQ to improve the accessibility of its public processes to those affected by the permitting of RCRA facilities.

C. ALLEGATION B: ADEQ's Alleged Misrepresentations Regarding the Outcome of the Permitting Process at the November 3, 1999, Public Hearing²²⁹

Complainants alleged discrimination based upon their perception that the outcome of the IWU permit proceeding was a foregone conclusion. By contrast, the transcripts for both the public hearing and the public meeting clearly indicate that ADEQ repeatedly told the public that the purpose of the proceedings and the public comment period was to take into account the

²²⁷ *Id.* at 4. See also last page in Fact Sheet.

²²⁸ Public Comment, Reporter's Transcript of Proceedings, February 9, 2000, at 11.

²²⁹ As noted above, allegations pertaining to the November 1999 hearing are untimely, so information related to those allegations are provided for background purposes.

questions and concerns of the community before finalizing the IWU permit.²³⁰ In addition, the Fact Sheet distributed at all the public gatherings relating to the IWU permit explicitly states that “[a]ll written comments delivered or postmarked by the last day of the public comment period will be considered in the formulation of the final determination regarding the draft the permit.”²³¹

Moreover, ADEQ made several changes to the final permit for IWU as a result of the comments submitted by the public.²³² Of the changes made to the permit, several specifically address the concerns of the South Phoenix community. The residents of South Phoenix were very concerned with the increase of traffic by trucks going to the IWU facility and, more importantly, the fact that by traveling down 15th Avenue, these trucks would pass directly in front of the Mary Bethune Elementary School.²³³ In response to the community’s concern, ADEQ added a provision to the IWU permit requiring that transporters to the facility avoid 15th Avenue between I-17 and Lincoln Street.²³⁴ By virtue of this requirement, trucks will no longer travel by the Mary Bethune Elementary School. Other changes made to the permit as a result of the public comments relate to IWU’s contingency plan, the inspection plan, container capacity levels, and methods of BTU determinations. In addition, as a result of the public comments the final permit now includes an updated facility drawing detailing the areas of equipment cleaning and drum washing.²³⁵

The facts gathered in EPA’s investigation show that ADEQ seriously considered the comments and suggestions provided by the community during the public comment period.

VII. CONCLUSION AND RECOMMENDATIONS

EPA’s investigation of the complaint filed by the IWU Negotiating Team does not support a finding of intentional discrimination against ADEQ on the allegations raised in the complaint. Accordingly, it is recommended that the Center on Race, Poverty and the Environment’s Title VI complaint be dismissed pursuant to 40 C.F.R. § 7.120(g). However, this

²³⁰ Finding of Fact 53.

²³¹ See Fact Sheet at 4.

²³² Finding of Fact 54.

²³³ Final Permit Decision and Response to Comments, Innovative Waste Utilization, EPA ID No.AZD980892731, April 12, 2001. See also Comment No. 19, at 14.

²³⁴ Hazardous Waste Facility Permit, Final Permit, for the Innovative Waste Utilization, LLC. Hazardous Waste Storage and Treatment Facility, Attachment A, provision A.3.

²³⁵ *Id.* See Final Permit Decision and Response to Comments, Innovative Waste Utilization, EPA ID No.AZD980892731, April 12, 2001. See also Comment No. 147, at 61.

Investigative Report recommends that OCR issue a “Letter of Concern” to ADEQ regarding a number of ADEQ’s activities in issuing the IWU permit.

There are several opportunities for ADEQ to improve its service to communities, such as the complainants in this matter. While these suggestions by no means cover all options available to ADEQ, they serve as a starting point for accommodations that ADEQ can provide to its constituency.

In order to more fully accommodate the needs of speakers of languages other than English, and to lessen the potential for future violations of Title VI and EPA regulations implementing Title VI, ADEQ should consider adopting a written policy and procedures on translation and interpretation, and training its staff accordingly. When establishing the policy and procedures, ADEQ should refer to the U.S. Department of Justice’s *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (DOJ LEP Guidance).²³⁶ The DOJ LEP Guidance suggests a four-factor analysis for recipients to determine the extent of their obligation to provide LEP services. Those factors include:

- (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
- (2) the frequency with which LEP individuals come in contact with the program;
- (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and
- (4) the resources available to the grantee/recipient and costs.²³⁷

In addition, ADEQ should also be aware that in coming months, EPA will release its *Proposed Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*. EPA urges ADEQ to avail itself of this document once it is released as it will provide ADEQ with suggestions tailored for recipient environmental agencies to assist non-English speakers.

In the meantime, in light of the findings of fact in this report, ADEQ could begin by considering a number of steps, such as the following:

- Train staff in assisting speakers of other languages when these individuals call the agency (e.g., ensure that ADEQ staff know to whom to refer speakers of other languages within the agency to have their questions answered) and provide sensitivity training to staff members.
- Hire trained translators for its public hearings when appropriate or, at the very

²³⁶ 67 Fed. Reg. 41,455 (2002)

²³⁷ 67 Fed. Reg. 41,459-61.

least, train its bilingual staff in translation services and legal terminology in the foreign languages to be used during hearings.

- Consider consulting with Arizona State University's interpreter program. The website for that program is www.asu.edu/educ/epsl/lpru.htm.
- Ensure that speakers of languages other than English learn about the availability of translation services at public hearings through:
 - Postings announcing the availability of translators at the entrance of the public hearing.
 - Stating in the public notices that translation services will be provided.
 - Working with the outreach community groups in ensuring that non-English speakers are made aware of the hearings or meetings and the fact that translation will be provided to them.
 - Making announcements in English and other predominant language(s) in the affected community.
 - Provide referrals in written materials to telephone numbers that are linguistically accessible (*e.g.*, a flyer in Spanish should provide the caller with a phone number at which they can contact a Spanish-speaking person) and provide an option of translation services at the hearing if they contact ADEQ by a certain date.
 - Place public service announcements on local radio shows, and using audio or video tapes in the foreign language used by members of the affected community.

With respect to outreach activities to ensure that minority populations are adequately informed about upcoming hearings and meetings, ADEQ should consider the general outreach suggestions made by EPA in the *Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (Recipient Guidance).²³⁸ In addition, based on the specific issues discussed in this report, ADEQ could consider using the following as possible mechanisms to reach affected communities:

- Ensure that public notices are mailed to both owners of property living within a 3-mile radius of the proposed facility and those living within a 3-mile radius of the proposed facility regardless of whether they rent or own the property in which they live.
- Insert information with utility bills, place notices on bulletin boards in grocery stores, houses of worship, community newspapers and community centers.

²³⁸ 65 Fed. Reg. 39,655 (2000).

- Consider regularly posting notices of public hearings in areas where members of the affected communities are likely to read them and provide an option of translation services at the hearing if they contact the Agency by a certain date.
- Include consideration of public transportation availability when selecting the location for public hearings. As demonstrated in this report, the location of the November 3, 1999, public hearing, South Mountain High School, was not “convenient” to those affected by the permit.
- Create a checklist with all of the items outlined above, and those that ADEQ considers important for the efficient execution of public hearings or meetings, and ensure that the checklist is used every time a public hearing is held.

EPA recognizes ADEQ’s most recent efforts to assist both the South Phoenix community and communities that live with the presence of permitted facilities. The “South Phoenix Environment Initiative” seems to be improving the conditions of South Phoenix and EPA expects that ADEQ will continue this work.²³⁹ EPA also commends ADEQ for its recent implementation of a Spanish language phone line to enable the State’s Spanish-speakers to access the same information as their English-speaking neighbors.²⁴⁰ As for ADEQ’s efforts to make its permitting process more accessible to the public, EPA encourages ADEQ to continue its work of involving communities in the permitting process as early as possible to increase public awareness and ensure effective public participation in the permitting of facilities.²⁴¹

²³⁹ The goal of the “South Phoenix Initiative” is to match ADEQ’s resources with the needs and concerns of the South Phoenix community. As part of this initiative, ADEQ held a series of meetings between South Phoenix community leaders and ADEQ upper management in order to educate ADEQ staff about the cultural and socioeconomic issues concerning the community. ADEQ also undertook the cleanup of the East Washington Fluff Site, a brownfields site during the Summer of 2001. On June 6, 2002, EPA Region 9 presented an award to ADEQ for its “South Phoenix Environmental Initiative.”

²⁴⁰ During the week of July 29, 2002, the Title VI Task Force members interviewed ADEQ staff members in the course of their investigation of the IWU complaint. During one of the many conversations between Ms. Hahn and Mr. Burr, a suggestion was made that ADEQ install a telephone system in Spanish so that Spanish-speakers in the State can access ADEQ information in their language. ADEQ thought this to be a good idea and was able to implement it several months later.

²⁴¹ ADEQ has made it part of its practice to hold small informational meetings with communities involved in permitting processes before the public hearings take place. These small meetings give ADEQ an opportunity to learn about the issues concerning the affected communities at an early stage while giving the public a chance to speak and to learn about the facility before they need to make formal comments about a particular permit.